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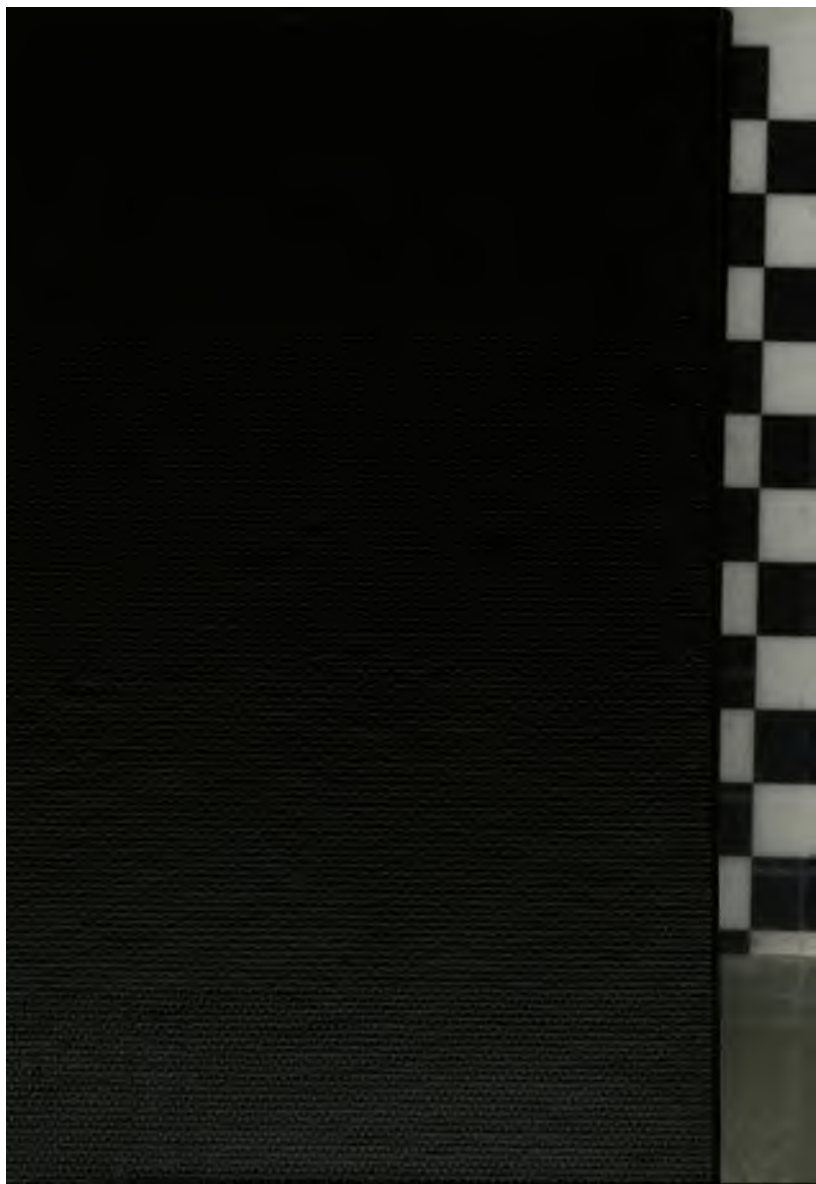
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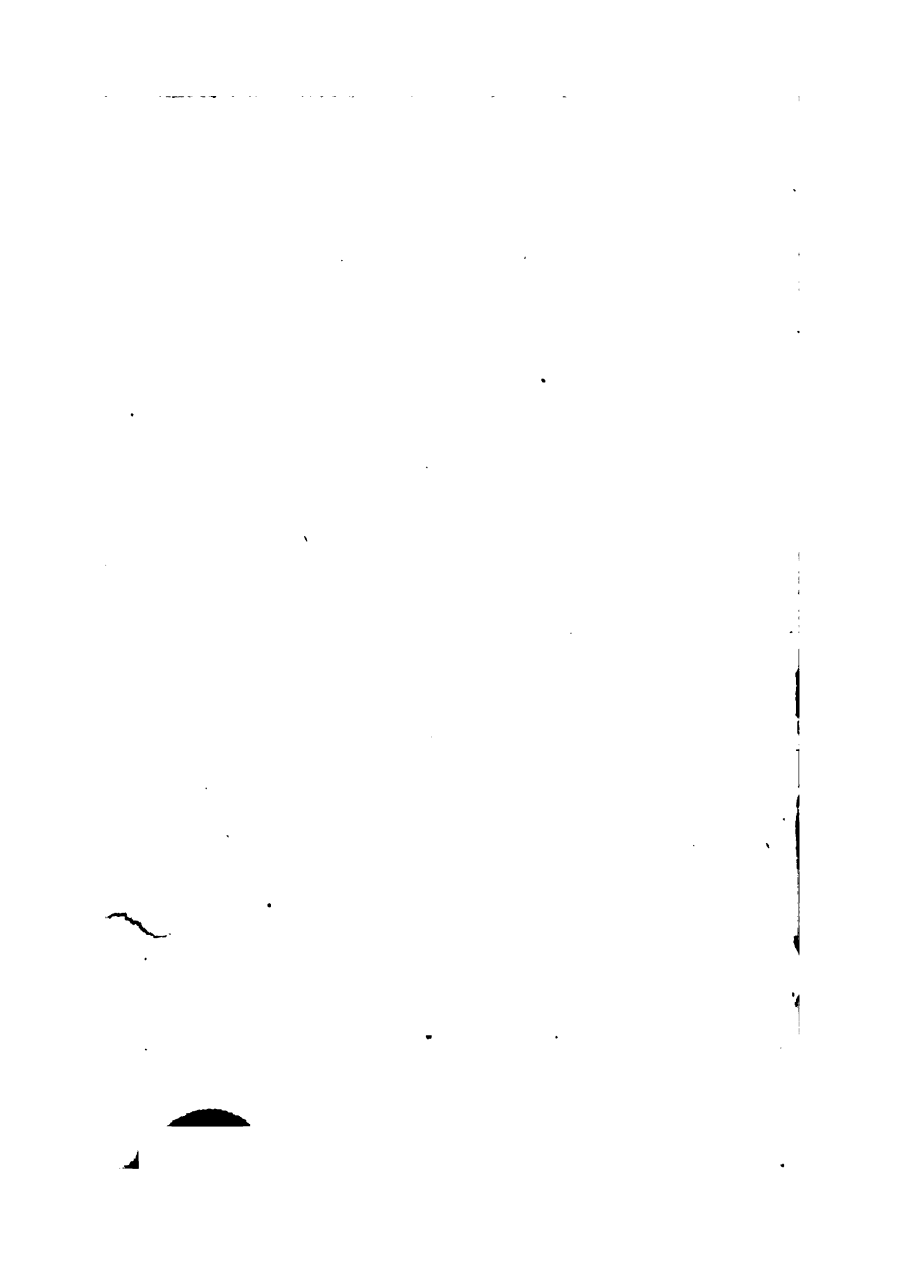




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A
MANUAL OF PRACTICE

IN THE COURTS OF THE
UNITED STATES.

Embracing the provisions of the Constitution, the Revised
Statutes, and Amendments thereto relating to Federal
Courts, together with the Rules promulgated by
the Supreme Court of the United States.

WITH NOTES OF DECISIONS.

BY
ROBERT DESTY,
ATTORNEY AT LAW

EIGHTH EDITION.
REVISED, REWRITTEN AND ENLARGED TO TWO VOLUMES.

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CHAPTER XVIII.

HABEAS CORPUS.

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§ 359. Power to issue.—The supreme court and the circuit and district courts shall have power to issue writs of *habeas corpus*. (Rev. Stats., sec. 751.)

Power to issue.—This section vests the power to issue the writ of *habeas corpus* in all the courts of the United States, and the next section vests it in every justice or judge of the United States. (Ex parte Bollman, 4 Cranch, 75; Ex parte Milligan, 4 Wall. 2.) It may issue from the supreme court to release one imprisoned under sentence of an inferior federal court (U. S. v. Hamilton, 3 Dall. 17; Ex parte Burford, 3 Cranch, 448; Ex parte Siebold, 100 U. S. 371; Ex parte Lange, 18 Wall. 163; Ex parte Yerger, 8 Wall. 85; Ex parte McCordle, 7 Wall. 506; S. C., 6 Wall. 318); as where a person is arrested on a bench-warrant (Ex parte Virginia, 100 U. S. 339; U. S. v. Hamilton, 3 Dall. 17), although the commitment was made by a court having power to commit. (Ex parte Bollman, 4 Cranch,

75; Ex parte Burford, 3 Cranch, 448; U. S. v. Hamilton, 3 Dall. 17.) It will issue whenever it is an exercise of appellate jurisdiction. (Ex parte Virginia, 100 U. S. 339; Ex parte Yerger, 8 Wall. 85.) It can only issue when it is necessary for the exercise of its jurisdiction. (Ex parte Barry, 2 How. 65; Ex parte Milburn, 9 Peters, 704; Ex parte Vallandigham, 1 Wall. 243.) So it may issue to determine whether the detention of a prisoner is lawful (Ex parte Watkins, 7 Peters, 568), and it may revise the proceedings, no matter in what custody the prisoner may be (Ex parte Yerger, 8 Wall. 85); but the supreme court has no power to award the writ to inquire into the validity of a commitment made by a judge at chambers. (Ex parte Metzger, 5 How. 176.) An alien cannot obtain the writ in the supreme court (Ex parte Barry, 2 How. 65); and whether the writ will issue to release one held under sentence of a court-martial, *quære*. (Ex parte Mason, 105 U. S. 696.) In what cases the federal courts have power to issue writ of *habeas corpus*, see Ex parte Royall, 117 U. S. 241; Ex parte Crouch, 112 U. S. 178; In re Ah Jow, 29 Fed. Rep. 181; Ex parte Perkins, 29 Fed. Rep. 900; Willdenhue's Case, 120 U. S. 1; Ex parte Davis, 21 Fed. Rep. 396; Ex parte Mirzan, 119 U. S. 584; Re Neagle, 39 Fed. Rep. 833; 40 Alb. L. J. 284; Medley, Petitioner, 134 U. S. 130; Savage, Petitioner, 134 U. S. 176.

Power of supreme court to issue writ.—Except in cases affecting ambassadors, or other public ministers or consuls, it can issue the writ only in aid of its appellate jurisdiction. (Ex parte Hung Hang, 108 U. S. 552.) The power of this court is expressly conferred by statute, and extends to the cases, among others, of prisoners in jail under or by color of the authority of the United States, and of persons who are in custody in violation of the constitution or laws of the United States. (Rev. Stats., secs. 751, 752, 753; Re Terry, 128 U. S. 289.) The writ will not issue out of this court where it may as well issue from the proper circuit court where no special circumstances make it necessary or expedient. (Re Huntington, 137 U. S. 63. See Ex parte Mirzan, 119 U. S. 584.) The supreme court will inquire as to the jurisdiction of an inferior court, as to the subject-matter or the person, even

if the inquiry involves facts outside of the record, if not inconsistent therewith. (Re Mayfield, 141 U. S. 107; Ex parte Yerger, 8 Wall. 85; Ex parte Virginia, 100 U. S. 339; Ex parte Carll, 106 U. S. 521; Ex parte Yarbrough, 110 U. S. 651; Ex parte Bigelow, 113 U. S. 328; Re Nielson, 131 U. S. 176; Re Savin, 131 U. S. 267; Re Cuddy, 131 U. S. 280.) The supreme court cannot discharge a person imprisoned under sentence of a territorial court, unless the sentence exceeds the jurisdiction. (Re Harding, 120 U. S. 782.) The jurisdiction of this court to review the judgments of the inferior courts of the United States in criminal cases, by *habeas corpus*, is limited to the question of the power of the court to try or to commit the prisoner for the act of which he has been convicted. (Ex parte Curtis, 106 U. S. 371; Ex parte Reed, 100 U. S. 13; Ex parte Virginia, 100 U. S. 339; Ex parte Carll, 106 U. S. 521.)

From the federal courts.—The federal courts are vested with power to issue the writ (In re Turner, 1 Abb. U. S. 84; Bennett v. Bennett, Deady, 300; Ex parte Des Rochers, McAll. 68; Ex parte Smith, 3 McLean, 121; U. S. v. Williamson, 4 Am. Law Reg. 5), as in extradition cases. (Ex parte Kaine, 3 Blatchf. 1; In re Stupp, 12 Blatchf. 501; Ex parte McKean, 3 Hughes, 23.) It may be issued to release a party from imprisonment under sentence of a court-martial (Meade v. Deputy Marshal, 1 Brock. 324), or to inquire into the validity of an enlistment into the military service. (Ex parte Schmidt, 1 Dill. 587; In re McDonald, 1 Low. 100; In re Keelewe, Hemp. 306; U. S. v. Anderson, Cooke, 143.) It may issue although the party is not in jail, and there has been no formal commitment (In re McDonald, 1 Low. 100), or although he is arrested under civil process. (Ex parte Reardon, 2 Cranch C. C. 639; Ex parte Randolph, 2 Brock. 447; In re Snow, 3 Wood. & M. 430. See Ex parte Wilson, 6 Cranch, 52; Wilson v. Marshal, 1 Cranch C. C. 608.) It may issue where a prisoner is under conviction and sentence as well as under commitment. (In re Greathouse, 2 Abb. U. S. 382; S. C. 4 Sawy. 487.) Federal courts have jurisdiction upon a writ of *habeas corpus* to inquire into the cause of the imprisonment of the petitioner, and if,

upon such inquiry, he is found to be "in custody for an act done or omitted in pursuance of a law of the United States," he is entitled to be discharged, no matter from whom or under what authority the process under which he is held may have issued. (Re Neagle, 39 Fed. Rep. 833.) *Habeas corpus* may be issued where a Chinaman is held in custody on a vessel in the port of San Francisco, and not permitted to enter the United States. (United States v. Jung Ah Lung, 124 U. S. 621; overruling Re Cummings, 32 Fed. Rep. 75.) A person imprisoned by local authorities, contrary to a treaty, for an offense on board a foreign vessel in a United States port, may enforce his rights under the treaty by writ of *habeas corpus*, in any proper court of the United States. (Mali v. Keeper of Common Jail, 120 U. S. 1.)

Not granted for mere correction of errors.—The writ will not issue to correct errors where they may be corrected by appeal to the state court of appeals. (Duncan v. McCall, 139 U. S. 449.) It will not be granted to release one convicted of selling intoxicating liquors, where an appeal was the proper remedy. (Allen v. Black, 43 Fed. Rep. 228.) Where a United States commissioner has jurisdiction of the subject-matter and of the person, irregularities in the proceedings before him are not reviewable on *habeas corpus* by the circuit court. (Stevens v. Fuller, 136 U. S. 468.) The including in one indictment and sentence of illegal voting, both for a representative in Congress and for presidential electors, does not go to the jurisdiction of the state court, but is, at the worst, mere error, which cannot be inquired into by writ of *habeas corpus*. (Ex parte Crouch, 112 U. S. 178; Re Coy, 127 U. S. 756-759; Fitzgerald v. Green, 134 U. S. 377.) Errors of law committed by the court that passed the sentence cannot be reviewed here on *habeas corpus*. (Ex parte Yarbrough, 110 U. S. 651; Ex parte Watkins, 3 Pet. 193; Ex parte Carll, 106 U. S. 521.) Errors committed in a criminal case by a state court of competent jurisdiction, while proceeding under statutes that do not conflict with U. S. Const., cannot be reached by *habeas corpus* in a federal court. (Jugiro v. Brush, 140 U. S. 291; 35 L. ed. 510; Wood v. Brush, 140 U. S. 278, 370; 35 L. ed. 505.)

Irregularities in the conduct of a case do not affect the final order so as to render it reviewable on *habeas corpus*. (Re Savin, 131 U. S. 267.)

When writ will be denied.—This court will deny the writ in cases where it may as well issue from the circuit court unless circumstances make action by this court necessary or expedient. (Re Huntington, 137 U. S. 63; Ex parte Mirzan, 119 U. S. 584.) Federal courts cannot, by *habeas corpus*, obstruct the ordinary administration of the criminal laws of the states through their own tribunals. (Wood v. Brush, 140 U. S. 278, 370.) The writ need not be awarded if it appear, upon the showing made by the petitioner, that if brought into court, and the cause of his commitment inquired into, he would be remanded to prison. (Ex parte Kearney, 7 Wheat. 38, 45; Ex parte Watkins, 3 Pet. 193, 201; Ex parte Milligan, 4 Wall. 2, 11; Re Terry, 128 U. S. 289.) A federal court may refuse the writ to one arrested for violation of an unconstitutional statute where he might have set this up in defense to the action against him. (U. S. v. Fiscus, 42 Fed. Rep. 395). It will be refused where the same question has been decided against the petitioner by another judge of the same court, in a cause then on trial in the court. (Re Simmons, 45 Fed. Rep. 241.) It will be refused where the statutes of a state regulating the selection of jurors do not conflict with the federal constitution. The remedy for the wrong done by discriminations is not by writ of *habeas corpus*. If, in any case, the criminal laws are administered by the state court so as to discriminate against an accused person because of his race, the remedy for the wrong done to him is not by a writ of *habeas corpus* from a court of the United States. (Jugiro v. Brush, 140 U. S. 291; 35 L. ed. 510; Wood v. Brush, 140 U. S. 278, 370.) So refusal to admit a person to bail pending a review of his conviction by the supreme court of the state is not a ground for a writ of *habeas corpus* from a federal court. (Re Humason, 46 Fed. Rep. 388.) The United States district court, or a judge thereof, has no jurisdiction to issue a writ of *habeas corpus* to recover the custody of a child withheld from its parent; nor to order the delivery of the child to its parent; nor to imprison for contempt for the disobedience of that order.

In such cases they cannot take jurisdiction on the ground of adverse citizenship. (Re Burrus, 136 U. S. 586.) The United States circuit court may properly decline to interfere by *habeas corpus* to discharge one convicted of murder in a state court which had jurisdiction of the person and offense, and whose errors, if any, may be corrected by appeal to the state court of appeals. (Ex parte Royall, 117 U. S. 241; Ex parte Fonda, 117 U. S. 516; cited in Duncan v. McCall, 139 U. S. 449.)

§ 360. Power of judges to grant.—The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty. (Rev. Stats., sec. 752.)

A justice of the supreme court may issue the writ (Ex parte Clarke, 100 U. S. 399); and if he issues it at chambers, he cannot then adjourn the proceeding to the supreme court for hearing. (Ex parte Kaine, 14 How. 103.) If issued from the court, it cannot be made returnable before a judge at chambers. (Ex parte Kaine, 14 How. 103.) Federal judges should grant writs of *habeas corpus* to persons for acts done in pursuance of a law of the United States. (Cunningham v. Neagle, 135 U. S. 1.)

§ 361. When prisoner is in jail.—The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the constitution or of a law or treaty

of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify. (Rev. Stats., sec. 753.)

Prisoner in custody.—The prisoner is entitled to his discharge from the custody of the warden of the penitentiary under the order and judgment of the court, within the language of this section, when he is in custody in violation of the constitution of the United States. (Ex parte Medley, 134 U. S. 160.) Imprisonment of an absconding debtor in jail on body executions and writs of attachment in civil actions will not defeat the power of a circuit court of the United States to issue a writ of *habeas corpus* in aid of extradition proceedings, notwithstanding the provisions of this section. (Re Mineau, 45 Fed. Rep. 188. See Re Cross, 13 Crim. L. Mag. 31; Re Fitton, 45 Fed. Rep. 471.) This section is quoted and applied in the case of *Cunningham v. Neagle*, 135 U. S. 1.

Habeas corpus—When writ will issue.—The writ cannot issue to release one committed under state authority, except as provided in this section (Ex parte Dorr, 3 How. 103; Ex parte McCann, 14 Am. Law Reg. 158; In re Veremaitre, 13 Law Rep. 608; *Elkison v. Delisseline*, 2 Wheel. C. C. 56); and it must be made to appear that the imprisonment is for an act done in pursuance of federal authority. (In re Bull, 4 Dill. 323.) So of a federal court officer (In re Ferrand, 1 Abb. U. S. 140; In re Neill, 8 Blatchf. 156; Ex parte Robinson, 1 Bond, 39; Ex parte Gifford, 5 Am. Law Reg. 659; Ex parte Robinson, 6 McLean, 355; Ex parte Jenkins, 2 Wall. Jr. 521; U. S. v.

Morris, 2 Am. Law Reg. 348); or a person convicted in a state court for an act done by him while in the military service of the United States (Coleman v. Tennessee, 97 U. S. 509); or a district attorney or marshal committed for contempt for not appearing *instantly* in a state court (Ex parte Turner, 3 Woods, 603); or a member of a canvassing board at an election at which members of Congress and presidential electors are to be chosen (Ex parte Hayne, 9 Chic. L. N. 106); or a supervisor for acts done in discharge of his duties (Ex parte Geissler, 4 Fed. Rep. 188); or a person convicted of perjury before an officer of the United States (Brown v. U. S., 2 Cent. L. J. 368; Ex parte Bridges, 2 Woods, 428); or a person imprisoned for a crime committed under the exclusive jurisdiction of the United States (Ex parte Tatem, 1 Hughes, 588); or a person convicted for the violation of the constitution or a treaty (In re Wong Yung Quy, 2 Fed. Rep. 624); or a person convicted for murder committed while executing a writ issued by a federal court (U. S. v. Jailer, 2 Abb. U. S. 265); or a person imprisoned under a state law that is unconstitutional (Ex parte McCready, 1 Hughes, 598); or an agent appointed by a governor of a state to make demand upon the governor of another state for a fugitive from justice (Ex parte Titus, 8 Ben. 411); or a party held under a warrant to await the requisition of the governor (In re Hoyle, 12 Chic. L. N. 279); or a party sent as a messenger to receive a fugitive from justice. (U. S. v. McClay, 23 Int. Rev. Rec. 80.) The power to arrest the arm of the state authorities under this section is one of delicacy, and should be exercised only when justice demands (Ex parte Thompson, 1 Flip. 507); and a party cannot be released on *habeas corpus* who after giving bail for his appearance in the federal court is subsequently arrested on a criminal charge. (U. S. v. French, 1 Gall. 1; U. S. v. Rector, 5 McLean, 174.)

§ 362. **Application for the writ.**—Application for writ of *habeas corpus* shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is in-

tended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application. (Rev. Stats., sec. 754.)

Application for writ.—If a party applies to the supreme court, he must first show that the court has jurisdiction over the case. (*Ex parte Milburn*, 9 Peters, 704.) The writ will not issue as a matter of course, although it is a writ of right (*In re Keeler*, Hemp. 306; *U. S. v. Lawrence*, 4 Wash. C. C. 518; *Ex parte Davis*, 14 Law Rep. 301); but when probable ground is shown that the party is in custody without just cause, it will be granted. (*Ex parte Winder*, 2 Cliff. 89.) Before it will be issued, it must appear that the party is detained against his will without authority, and is entitled to relief (*Ex parte Keeler*, Hemp. 306; *Ex parte Davis*, 14 Law Rep. 301); and it is doubtful if it can be used to transfer a prisoner against his will on the application of persons claiming his custody. (*In re Hoyle*, 9 Am. Law Rec. 65.) The writ may be issued at the instance of a third party, who has no other interest than sympathy with the oppressed (*In re Hoyle*, 9 Am. Law Rec. 65; *Ex parte Des Rochers*, McAll. 68); and a wife may apply for the writ. (*In re Ferrens*, 3 Ben. 142.) If a party is detained under a commitment, he must produce a copy thereof, or an affidavit that the sheriff refused him a copy. (*In re Harrison*, 1 Cranch C. C. 159; *U. S. v. Bollman*, 1 Cranch C. C. 373.) The application must be supported by oath, taken before one of whom judicial notice will be taken as qualified to administer oaths. (*In re Keeler*, Hemp. 306.) The application must set forth the facts concerning the detention, in whose custody, and by virtue of what claim. (*Re Cuddy*, 131 U. S. 280.) Where the statement in the application is denied, it cannot be presumed that the statement is true. (*Holden v. Minnesota*, 137 U. S. 483.) Upon complaint in writing, signed by and verified by the oath of the person for

whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known, it is the duty of the court to "forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto." (Rev. Stats., secs. 754, 755; *Re Terry*, 128 U. S. 289.)

§ 363. Allowance and direction of the writ.—The court, or justice, or judge to whom such application is made shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained. (Rev. Stats., sec. 755.)

Writ, when issued.—Whether the writ shall issue or not depends upon the facts presented in the petition showing a cause for his release (*Ex parte Kinney*, 3 Hughes, 9); and the truth or falsity of the fact must be determined at the hearing. (*Ex parte Hayne*, 9 Chic. L. N. 106.) Instead of directing the writ to issue in the first instance, the court may enter a rule to show cause. (*Ex parte Milburn*, 9 Peters, 704.) If the petition shows that the party is rightfully detained, the court may refuse the writ (*Ex parte Watkins*, 3 Peters, 193; *U. S. v. Lawrence*, 4 Wash. C. C. 518; *Ex parte Milligan*, 4 Wall. 2); and if the commitment is regular, he will not be released on the ground that he was insane when he committed the offense. (*U. S. v. Lawrence*, 4 Wash. C. C. 518.)

§ 364. Time of return.—Any person to whom such writ is directed shall make due return thereof within three days thereafter, unless the party be detained beyond the distance of twenty miles; and if beyond that distance, and not beyond a distance of a hundred miles,

within ten days; and if beyond a distance of a hundred miles, within twenty days. (Rev. Stats., sec. 756.)

Note.—If the party to whom the writ is directed fails to make return, attachment may issue without an *alias* or *pluries* writ. (U. S. v. Bollman, 1 Cranch C. C. 373.)

§ 365. Form of return.—The person to whom the writ is directed shall certify to the court, or justice, or judge before whom it is returnable the true cause of the detention of such party. (Rev. Stats., sec. 757.)

Return of writ.—The return should be signed by him to whom it is directed (Seavey v. Seymour, 3 Cliff. 439); and if the return be false or evasive, he may be committed for a contempt (U. S. v. Davis, 5 Cranch C. C. 622; U. S. v. Williamson, 3 Am. Law Reg. 729; S. C., 4 Am. Law Reg. 5); and a petition from the person denying his detention cannot be filed (U. S. v. Williamson, 4 Am. Law Reg. 5.) If defendant is present in court, he may be directed to answer interrogatories without issuing a writ of attachment. (U. S. v. Green, 3 Mason, 482.) Where the return shows that the prisoner was charged with a crime against the laws of the United States and within the jurisdiction of that court, the order remanding him was proper. (Palliser v. United States, 136 U. S. 256.) The return must specify the true cause of detention, and the petitioner may deny any of the facts set forth in the return. (Re Cuddy, 131 U. S. 280.) At common law, no evidence was necessary to support the return; it was deemed to import verity until impeached. (Crowley v. Christensen, 127 U. S. 86.) And this rule is not changed by any U. S. statute. (Id.) A return to a writ of *habeas corpus* is not demurrable for defects in averments, where they are supplied by petitioner's allegations and proofs. (Re Ah Toy, 45 Fed. Rep. 795.)

§ 366. Body of the party to be produced.—The person making the return shall at the same time bring the body of the party before the judge who granted the writ. (Rev. Stats., sec. 758.)

Note.—It is the duty of the person making the return to bring in the body, or if that has passed beyond his control, to declare so far as he knows what has become of him (U. S. v. Williamson, 4 Am. Law Reg. 5); and simply declaring that the person is not in his power, custody, or control, unless all the material facts are stated, will not effect a discharge. (U. S. v. Green, 3 Mason, 482.) Pending the examination, he is detained under the authority of the writ of *habeas corpus*, and may be bailed out from day to day, or be remanded to jail (*Ex parte v. Kaine*, 14 How. 103); and if he is brought from the custody of a state officer under a writ of *habeas corpus ad testificandum*, he will be remanded to such state officer's custody. (In re Hamilton, 1 Ben. 455.) While in custody under a writ of *habeas corpus* he cannot be arrested on a second warrant. (In re Farez, 7 Blatchf. 345.)

§ 367. Day of hearing.—When the writ is returned, a day shall be set for the hearing of the cause, not exceeding five days thereafter, unless the party petitioning requests a longer time. (Rev. Stats., sec. 759.)

§ 368. Denial of return.—The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after

the same are filed, so that thereby the material facts may be ascertained. (Rev. Stats., sec. 760.)

Who may deny.—The person filing the petition may be some person other than the prisoner. (In re Hoyle, 12 Chic. L. N. 279.) The petitioner may deny any material fact set out in the return. (Seavey v. Seymour, 3 Cliff. 439; see *Ex parte Kaine*, 10 N. Y. Leg. Obs. 257.) Under this section no pleading is required after the traverse to the return. The new matter averred therein is to be deemed at issue. (In re Leary, 10 Ben. 198.) On *habeas corpus* the question of the identity of the prisoner with the person named in the warrant is always open. (In re Leary, 10 Ben. 198.) That the petitioner may deny any of the facts stated in the return, see *Re Cuddy*, 131 U. S. 280.

§ 369. Summary hearing—Disposition of party.—The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require. (Rev. Stats., sec. 761.)

Review on writ.—The decision of an officer who commits a person for interference with the discharge of his duties may be inquired into on application for the writ of *habeas corpus*. (*Ex parte Geissler*, 4 Fed. Rep. 188.) So the decision of a board that a person is not exempt from a draft is not conclusive. (Case of Antrim, 5 Phila. 278.) On a review upon the application by a party held under a commitment, the inquiry is as to whether there is probable cause to believe that he committed the offense. (U. S. v. Johns, 4 Dall. 412; In re Farez, 7 Blatchf. 345; *Ex parte Kaine*, 10 N. Y. Leg. Obs. 257.) If the commitment is by a commissioner, the court may examine the evidence taken before him, to know whether it

is proper to continue the confinement (In re Martin, 5 Blatchf. 303; Ex parte Bennett, 2 Cranch C. C. 612); and if not in writing, the commissioner may be required to state on oath the evidence upon which he granted the commitment. (Ex parte Bennett, 2 Cranch C. C. 612.) If the commitment be by a commissioner for extradition, the court may determine the competency of the evidence on which to exercise a judgment, but not whether legal evidence before the commissioner was sufficient or insufficient to warrant his conclusion (Ex parte Van Aernam, 3 Blatchf. 160; In re McDonnell, 11 Blatchf. 79; In re Wahl, 15 Blatchf. 334; In re Stupp, 12 Blatchf. 501; In re Veretremaitre, 9 N. Y. Leg. Obs. 137; In re Kaine, 10 N. Y. Leg. Obs. 257; In re Heilbron, 12 N. Y. Leg. Obs. 65; but see In re Heinrich, 5 Blatchf. 414); and if there is competent testimony his decision cannot be reviewed. (In re Fowler, 4 Fed. Rep. 303; In re Vandervelpin, 14 Blatchf. 137; In re Wiegand, 14 Blatchf. 370; In re Wahl, 15 Blatchf. 334.) If the commitment is improper the party may be remanded, that proceedings *de novo* may be taken before the commissioner (In re Farez, 7 Blatchf. 345); but he may be released if the warrant is void. (In Farez, 7 Blatchf. 345.) So if the commitment is irregular the court may discharge the prisoner from it, but may commit him *de novo* if there is sufficient evidence for that purpose. (Ex parte Bennett, 2 Cranch C. C. 612.) Under the act of Congress of February 5, 1867 (14 Stat. 385), the court or judge shall proceed in a summary way to determine the facts of the case on *habeas corpus*; and if the petitioner is deprived of liberty in contravention of the constitution or laws of the United States, he shall forthwith be discharged. (Cunningham v. Neagle, 135 U. S. 1; Ex parte Medley, 134 U. S. 160.) Where a prisoner is held in a state court to answer for necessarily killing the assailant of one whom it is his legal duty to protect, he cannot be guilty of a crime under the state law which justifies the protection of the life of another. (Cunningham v. Neagle, 135 U. S. 1.)

Question of jurisdiction.—The inquiry on *habeas corpus* is one of jurisdiction. (Delgado v. Chavez, 140 U. S. 586.) It is an inquiry into the legality of the detention,

and is a new suit to enforce a civil right, where he claims his liberty under the constitution and a treaty of the United States. (Ex parte Tom Tong, 108 U. S. 556.) As where one is in custody, under an order in excess of the jurisdiction. (Ex parte Rowland, 104 U. S. 604; 26 L. ed. 861; Ex parte Fisk, 113 U. S. 713; Re Nielsen, 131 U. S. 176.) The writ may be used to obtain a discharge from imprisonment under an order of a court which does not possess jurisdiction. (Re Terry, 128 U. S. 289.) A person will not be discharged on the ground of want of jurisdiction, where there is fair reason to believe that the court has jurisdiction, and there is no jurisdiction in any other court. (Re Jackson, 40 Fed. Rep. 372.)

Grounds for discharge on writ.—Where one is in custody for acts done in pursuance of the constitution and laws of the United States, he should be discharged from custody under the writ. (Ex parte Royall, 117 U. S. 241; Thomas v. Loney, 134 U. S. 372; Re White, 43 Fed. Rep. 913; 45 Fed. Rep. 237; Re Beine, 42 Fed. Rep. 545; Ex parte McClusky, 40 Fed. Rep. 71; Re Shaner, 39 Fed. Rep. 869; Cunningham v. Neagle, 135 U. S. 1; 41 Alb. L. J. 367; 14 Va. L. J. 305.) A duty imposed upon a marshal is a law, within the meaning of the statute providing for the writ of *habeas corpus*. (Cunningham v. Neagle, 39 Fed. Rep. 833.)

Release under.—If a certificate granted by a commissioner was issued without authority of law, the party held under it may be released (Ex parte Davis, 14 Law Rep. 301); so where a party has been arrested under a treasury warrant issued without authority (Ex parte Randolph, 2 Brock. 447); so if the sentence of a court is void, as being in excess of its authority (Ex parte Lange, 18 Wall. 163); so if a military commission imposes a sentence not authorized by law (Ex parte Hewett, 3 Am. Law Rev. 382); so if a court-martial proceeds against a party without notice its sentence is void, and the party may be released (Meade v. Deputy Marshal, 1 Brock. 324); but if a court-martial has jurisdiction, a party held for trial cannot be released (In re Bogart, 2 Saw. 396); nor can its judgment be collaterally impeached for irregularities. (Ex parte Reed, 100

U. S. 13.) If the statute under which a party is indicted is unconstitutional, it cannot be a legal cause of imprisonment (Ex parte Siebold, 100 U. S. 371); and the appellate court may give relief without waiting for an appeal or writ of error. (Ex parte Siebold, 100 U. S. 371.) If a party under sentence has received a pardon, he may be released under this writ. (Ex parte Greathouse, 4 Saw. 487.) A discharge from the process under which he is imprisoned discharges him from confinement under that process alone. (Ex parte Milburn, 9 Peters, 704.) A person imprisoned under a sentence for a longer time than the court had power to impose can be released on *habeas corpus*. (Re Monroe, 46 Fed. Rep. 52.) So where process is void, he may be released on the ground that he is deprived of liberty without due process of law (Re Monroe, 46 Fed. Rep. 52); or where the court had no jurisdiction of the offense. (Re Coy, 127 U. S. 731.) So a second conviction and punishment for the same offense is an excess of authority. (Re Nielson, 131 U. S. 170.)

When not released.—If a court holding a party under sentence had jurisdiction, he cannot be released merely for errors in the proceedings (Ex parte Parks, 93 U. S. 18; Ex parte Siebold, 100 U. S. 371; Ex parte Callicott, 8 Blatchf. 89; Ex parte Watkins, 3 Peters, 193; Ex parte Shaffenburg, 4 Dill. 271; Johnson v. U. S., 3 McLean, 89), although the indictment alleges the commission of the crime more than two years before commencement of the prosecution (Johnson v. United States, 3 McLean, 89), or although it does not show any offense cognizable by such court. (Ex parte Watkins, 3 Peters, 193.) If a party has been committed for a contempt, inquiry cannot be made into the sufficiency of the cause of commitment. (Ex parte Kearney, 7 Wheat. 38.) The decision of one court or judge upon a return of the writ will not bar successive applications for discharge under the writ of *habeas corpus*. (Ex parte Kaine, 3 Blatchf. 1.)

§ 370. In cases involving the law of nations.—When a writ of *habeas corpus* is issued in the case of any prisoner who, being a

subject or citizen of a foreign state, and domiciled therein, is committed or confined or in custody, by or under the authority or law of any one of the United States, or process founded thereon, on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations, notice of the said proceedings to be prescribed by the court or justice or judge at the time of granting said writ shall be served on the attorney-general or other officer prosecuting the pleas of said state, and due proof of such service shall be made to the court or justice or judge before the hearing. (Rev. Stats., sec. 762.)

§ 371. Appeals to circuit court.*—From the final decision of any court, justice, or judge inferior to the circuit court, upon an application for a writ of *habeas corpus*, or upon such writ when issued, an appeal may be taken to the circuit court for the district in which the cause is heard,—

1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution or of any law or treaty of the United States.

2. In the case of any prisoner who, being a subject or citizen of a foreign state, and domi-

* This appeal now lies to the circuit court of appeals instead of to the circuit court. (See Act for Creation for Circuit Courts of Appeals, 26 U. S. Stats. 828.)

ciled therein, is committed or confined or in custody, by or under the authority or law of the United States, or of any state, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof. (Rev. Stats., sec. 763.)

Except in cases provided for in this section, no appeal lies to the circuit court on an application for *habeas corpus*, and under this section it can re-examine the decision only on evidence introduced in the district court, unless competent evidence was offered and improperly excluded. (Seavey v. Seymour, 3 Cliff. 439; see *Ex parte McCardle*, 6 Wall. 318; S. C., 7 Wall. 506; *Ex parte Yerger*, 8 Wall. 354.) There is nothing in this section which requires appeals to be to the next term. (Roberts v. Reilly, 116 U. S. 80.)

§ 372. Appeal to supreme court.—From the final decision of such circuit court an appeal may be taken to the supreme court in the cases described in the preceding section. (Rev. Stats., sec. 764, as amended, 23 U. S. Stats. 437.)

Appeal.—No appeal lies to the supreme court from an order of a circuit judge, sitting as such and not as a court, discharging a prisoner brought before him on a writ of *habeas corpus*. (Carper v. Fitzgerald, 121 U. S. 87. See *Ex parte Royall*, 112 U. S. 181.) Since the amendment of section 764, R. S., so as to give this court jurisdiction, upon appeal, to review the final decisions of the

circuit court of the United States in cases of *habeas corpus*, the right to the writ, upon original application to this court is not, in every case, an absolute one. (Wales v. Whitney, 114 U. S. 564; 29 L. ed. 277; Ex parte Royall, 117 U. S. 241, 250; Ex parte Terry, 128 U. S. 289.) A final order of the circuit court at a stated term, dismissing a writ of *habeas corpus* and remanding the prisoner to the custody of the marshal for trial, is appealable to this court. (Palliser v. United States, 136 U. S. 256.) The supreme court may, by means of the writ of *certiorari*, review the judgments of the circuit courts of appeals in *habeas corpus* cases. (Law Ow Bew v. U. S., 144 U. S. 47.)

§ 373. Appeals, how taken.—The appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of *habeas corpus*, return thereto, and other proceedings, as may be prescribed by the supreme courts, or, in default thereof, by the court or judge hearing the cause. (Rev. Stats., sec. 765.)

How taken.—The provisions of this section do not violate the seventh amendment to the constitution. (McElrath v. U. S., 102 U. S. 426.) Citation is not required when the appeal is taken in open court during the term at which the decree is entered; *aliter* where at a subsequent term the appeal is allowed, although the solicitors of the appellee be present. (Railroad Co. v. Blair, 100 U. S. 661.) The appeal will not, however, be dismissed in the latter case, but terms will be imposed upon the appellant. (Dayton v. Lash, 94 U. S. 112; Railroad Co. v. Blair, 100 U. S. 661.) The appeal must be in writing and filed with the clerk, and when afterwards the bond is

given, the appeal is perfected. (*Winslow v. Wilcox*, 12 Fed. Rep. 352.)

§ 374. Pending proceedings—Action by state authority void.—Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any state court, or by or under the authority of any state, for any matter so heard and determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void. (Rev. Stats., sec. 766.)

Jurisdiction of the state court under this section is restrained only pending the proceeding in the courts of the United States on *habeas corpus*, and until final judgment therein. (*Jugiro v. Brush*, 140 U. S. 291.) A judgment of the supreme court of the United States affirming a judgment of the circuit court denying a *habeas corpus* to review the judgment of a state court in a criminal case is a final judgment within this section. (*Jugiro v. Brush*, 140 U. S. 291.)

CHAPTER XIX.

EVIDENCE.

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§ 375. No witness excluded on account of color or interest.—In the courts of the United States no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried; *provided*, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to

testify against the other, as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty. [See Rev. Stats., sec. 1977.] (Rev. Stats., sec. 858.)

The competency of parties to testify as to transactions with decedent in actions against personal representatives is to be determined by this section (Page v. Burnstine, 102 U. S. 664); and the objection to the competency of a witness is disposed of under this section. (Nat. Bk. v. Potter, 102 U. S. 163; Beardsley v. U. S., 3 Morr. Trans. 541.) This section does not apply to territorial courts (Good v. Martin, 95 U. S. 90); but it applies to courts of the District of Columbia. (Noerr v. Brewer, 1 McAr. 507.) This section applies to trials in which the United States is a party. (Green v. U. S., 9 Wall. 655; but see Jones v. U. S., 1 Ct. of Cl. 383.) It is remedial, and its language should be construed accordingly. (Texas v. Chiles, 21 Wall. 488.) A party may testify either orally or by deposition. (Cornett v. Williams, 20 Wall. 226.) This section applies to a case where a party offers to testify on his own behalf (Texas v. Chiles, 21 Wall. 488; Railroad Co. v. Pollard, 22 Wall. 341); but an application for an order to testify in one's own behalf must not be granted if it would adopt a rule of decision different from that which the legislature of the state has prescribed for state courts in similar cases. (Robinson v. Mandell, 3 Cliff. 169.) A husband is a competent witness to testify as to a claim in favor of his wife (In re Campbell, 3 Hughes, 276; Green v. Taylor, 3 Hughes, 400), and she is a competent witness in an action for damages for injury to her if made so under the laws of the state (Packet Co. v. Clough,

20 Wall. 528); but at common law a wife cannot testify in favor of her husband. (*Lucas v. Brooks*, 18 Wall. 436.) This section applies to the courts of the District of Columbia. (Page v. Burnstine, 102 U. S. 664.) No witness can be excluded because he is a party to or interested in the issue tried. (*King v. Worthington*, 3 Morr. Trans. 101; *Potter v. National Bank*, 102 U. S. 163; *Railroad Co. v. Koontz*, 104 U. S. 5; *Texas v. Chiles*, 21 Wall. 488; *Nash v. Williams*, 20 Wall. 226; *N. J. R. Co. v. Pollard*, 22 Wall. 877; *The Argo*, 2 Wheat. 287.) The proviso of this section excludes only parties to the issue from testifying as to transactions with a deceased person in an action against his executor, etc. (*Potter v. Third Nat. Bank of Chicago*, 102 U. S. 163; *Monongahela Nat. Bank v. Jacobus*, 109 U. S. 275.) The exception cannot be extended so as to exclude parties from testifying in their own behalf against assignees in bankruptcy. (*Hobbs v. McLean*, 117 U. S. 567.) In the United States courts no witness can be excluded in any civil action because he is a party to or interested in the issue tried. (*Potter v. Third Nat. Bank of Chicago*, 102 U. S. 163; *Bradley v. United States*, 104 U. S. 442.) And this rule applies to trials in which the United States is a party. (*Green v. United States*, 9 Wall. 655.) A party to the record may testify like other witnesses, either orally or by deposition. (*Nash v. Williams*, 20 Wall. 226.) Their testimony, in a proper case, may be taken by depositions *de bene esse* (*Nash v. Williams*, 20 Wall. 226; *New Jersey R. R. & Trans. Co. v. Pollard*, 22 Wall. 341), and the deposition of one party may be taken in behalf of another. (*Texas v. Chiles*, 21 Wall. 488.) Under section 34 of the Judiciary Act, a party to a suit in the circuit court in Ohio must be admitted as a witness in his own behalf, being competent as such in the state courts. (*Wright v. Bales*, 2 Black, 535; *Vance v. Campbell*, 1 Black, 427; *Ryan v. Bindley*, 1 Wall. 66.) This section, relating to the competency of parties as witnesses, applies to the District of Columbia as fully as to the circuit and district courts of the United States. (Page v. Burnstine, 102 U. S. 664, cited in *McAllister v. U. S.*, 141 U. S. 174.)

Parties to suit.—A party merely having an interest

in the suit is a competent witness, although one of the parties is an executor (*Potter v. Third Nat. Bk.*, 13 Chic. L. N. 102); but where an administrator is a party, the opposite party is not competent to testify unless called by the administrator or required to testify by the court. (*James v. Atlantic Delaine Co.*, 3 Cliff. 614.) The opposite party is that party against whom the evidence is sought to be used. (*Eslava v. Mazange*, 1 Woods, 623.) This section does not contemplate an *ex parte* order permitting a party to testify. (*Eslava v. Mazange*, 1 Woods, 623.) A bill in equity for a discovery merely is unnecessary, as a party may be examined as a witness (*Heath v. Erie Railway Co.*, 9 Blatchf. 316); and admissions of a party are competent against him, although he testified in the case, and was not asked whether he made them or not. (*The Stranger*, 1 Brown Adm. 281.) It is for the court to suggest that a party be called in special cases. (*Eslava v. Mazange*, 1 Woods, 623.) If a party dies after his testimony has been taken, the adverse party may be examined if the administrator insists. (*Mumm v. Owens*, 2 Dill. 475. See *Jerman v. Stewart*, 12 Fed. Rep. 275.) Congress intended no more than to restore the common-law rule of evidence. (*U. S. v. Clark*, 96 U. S. 42.) A party interested in the issue but not a party to the suit is competent to testify as to statements of the testator. (*Porter v. Nat. Bank*, 102 U. S. 163.)

§ 376. Defendants in criminal cases.

—That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts, territorial courts, and courts-martial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall

not create any presumption against him. (20 U. S. Stats. 30.)

§ 377. Testimony before Congress.—No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege. (Rev. Stats., sec. 859.)

§ 378. Pleadings, disclosures, etc.—No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign county, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; *provided*, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid. (Rev. Stats., sec. 860.)

Note.—Section partly repealed by act of June 22, 1874, sec. 5 (18 Stats. 186.) (U. S. v. Three Tons, 6 Biss. 379; U. S. v. Distillery, 6 Biss. 483.) The books and papers of a party taken from him are competent evidence against him (U. S. v. Myers, 1 Hughes, 533; U. S. v. Hughes, 12 Blatchf. 553); but he cannot be required to produce the books and papers which will subject him to the penalty. (Johnson v. Donaldson, 3 Fed. Rep. 22; 18 Blatchf. 287.)

§ 379. Proof in common-law actions.

—The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided. (Rev. Stats., sec. 861.)

Note.—Open court means in presence of the court and jury at the trial. (*Beardsley v. Littell*, 14 Blatchf. 102.) This section does not refer to discovery. (*Bryant v. Leyland*, 6 Fed. Rep. 125. See *Ex parte Fisk*, 113 U. S. 713.)

§ 380. Proof in equity and admiralty causes.—The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the supreme court, except as herein especially provided. (Rev. Stats., sec. 862.)

Note.—This section does not expressly repeal the act (1 Stat. 88) in relation to oral examination of witnesses. (*Blease v. Garlington*, 92 U. S. 1.)

§ 381. Notaries may take depositions, acknowledgments, etc.—Notaries public of the several states, territories, and the District of Columbia are hereby authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits in the same manner and with the same effect as commissioners of the United States circuit court may now lawfully take or do. (1876; 19 U. S. Stats. 206.)

§ 381 a. Depositions may follow state usage.—In addition to the mode of taking the depositions of witnesses in causes pending at

law or equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held. (27 U. S. Stats. 7.)

§ 382. **Depositions de bene esse.**—The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or a superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness, and the time and place of the taking of his

deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court. (Rev. Stats., sec. 863.)

Conditions under which taken.—The conditions under which a party is permitted, and a magistrate authorized, to take depositions *de bene esse* under the act of 1879 are: (1) that the witness lives at a greater distance from the place of trial than one hundred miles; (2) or is bound on a voyage to sea; (3) or is about to go out of the United States (4) or out of such district to a greater distance from the place of trial than one hundred miles, before the time of the trial; (5) or is ancient or very infirm. (Harris v. Wall, 7 How. 693; Patapsco Ins. Co. v. Southgate, 5 Pet. 604.) The liability of a witness who is a seaman on board a gunboat, to be ordered out of the reach of the court, is not a sufficient cause for taking a deposition *de bene esse*, under the Judiciary Act of 1789. (The Samuel, 1 Wheat. 9.) This section applies to equity as well as to common-law causes. (Stegner v. Blake, 36 Fed. Rep. 183.)

To what applies.—The provisions of this section do

not apply to depositions taken under a rule of court (Barnert v. Day, 3 Wash. C. C. 243); nor to cases pending in the supreme court. (The Argo, 2 Wheat. 287; The London Packet, 2 Wheat. 371.) The court may issue a subpoena *duces tecum* to compel the production of books and papers (Ex parte Peck, 3 Blatchf. 113; U. S. v. Tilden, 10 Ben. 566); but not for the purpose merely to refresh the memory of the witness. (U. S. v. Tilden, 10 Ben. 566.) The provision for taking depositions *de bene esse* is still in force, the mode being that provided by equity, rule 67. (Bischoffsheim v. Baltzer, 10 Fed. Rep. 1.) The conditions under which a deposition *de bene esse* may be taken are, first, that the witness lives more than one hundred miles distant; second, or is bound on a sea voyage; third, or is about to leave the United States; fourth, or about to go out of the district to a distance greater than one hundred miles; fifth, or is very old or very infirm. (Harris v. Wall, 7 How. 693.) It may be taken out of the district as well as within it (Patapsco Ins. Co. v. Southgate, 5 Pet. 604; but see Evans v. Hettick, 3 Wash. C. C. 408; Bleecker v. Bond, 3 Wash. C. C. 529; U. S. v. Tilden, 25 Int. Rev. Rec. 352; Ex parte Humphreys, 2 Blatchf. 228); and a second deposition of the same witness may be taken without an order of court. (Cornett v. Williams, 20 Wall. 226.) Before the subpoena is issued evidence should be produced to show that the case is one in which such examination can be had. (Ex parte Peck, 3 Blatchf. 113.) A witness casually absent cannot be compelled to appear and testify at the place where he is sojourning. (Ex parte Humphreys, 2 Blatchf. 228.) So if he resides more than one hundred miles distant he cannot be compelled to testify before an officer in the district where he resides. (Henry v. Ricketts, 1 Cranch C. C. 580.) The liability of a witness to be ordered out of the reach of the court is not sufficient for taking a deposition *de bene esse*. (The Samuel, 1 Wheat. 9.) A party may apply for a *dedimus*, and cause testimony to be taken of the *dedimus* so stated, orally. (Egbert v. Citizens' Ins. Co., 7 Fed. Rep. 51; 2 McCrary, 386.) A commissioner under a *dedimus potestatem* may be an officer of any kind, or any one not an officer, and is not within this section. (Jerman v. Stewart, 12 Fed. Rep. 273.)

Subpoena duces tecum. — The authority to take testimony *de bene esse* must be strictly construed, and all requisites of law must be complied with before such testimony is admissible (Bell v. Morrison, 1 Pet. 351; Harris Wall. 7 How. 693; Carrington v. Stimson, 1 Curt. 437; Allen v. Blunt, 2 Wood. & M. 121; Jones v. Neale, 2 Mart. (N. C.) 81); and there must be direct proof that the requirements of the statute were complied with. (Bell v. Morrison, 1 Pet. 351.) Depositions not taken according to the rules of law of the federal courts are not admissible, though taken according to the rules of practice of the state courts. (Evans v. Eaton, 7 Wheat. 356; Evans v. Hettick, 3 Wash. C. C. 408.) They cannot be used in a case in equity (Walker v. Parker, 5 Cranch C. C. 639); as under this section they can be taken without a commission. Pettibone v. Derringer, 4 Wash. C. C. 215.) The provisions of this section should never be resorted to, except in cases of absolute necessity. (Walsh v. Rogers, 13 How. 283.) It may be taken before a probate court if it is a court of record (Merrill v. Dawson, 11 How. 375); or before any county judge (Voce v. Lawrence, 4 McLean, 203); or before a commissioner of the circuit court (Whitney v. Hunt, 5 Cranch C. C. 120); or a notary public (Dinsmore v. Maroney, 4 Blatchf. 416); but not before a township justice (Shutte v. Thompson, 15 Wall. 151); or a judge of a county commissioner's court (Garey v. Union Bank, 3 Cranch C. C. 91); or a judge of the city court. (Foreman v. Holmead, 5 Cranch C. C. 162). A commissioner cannot issue the writ of *habeas corpus* for the purpose of taking the deposition of the prisoner. (Ex parte Barnes, 1 Sprague, 133.) Depositions *de bene esse* taken pursuant to this section may be opened before the trial by order of court upon motion of one party and against the objection of the other party. (U. S. v. Tilden, 10 Ben. 170; see U. S. v. Hall, 44 Fed. Rep. 883.) A deposition taken under this section cannot be used against objection, when it appears that the witness is actually present in court, ready and able to testify if called. (Whitford v. Clark County, 119 U. S. 522.)

Notice to adverse party. — Reasonable notice must be given to the adverse party (Egbert v. Citizens' Ins.

Co., 7 Fed. Rep. 51); taken without notice to the adverse party cannot be used if such adverse party or his attorney is within one hundred miles (The Sailor's Bride, 1 Brown Adm. 68; Pendleton v. Forbes, 1 Cranch C. C. 507; Dunlop v. Monroe, 1 Cranch C. C. 536; Allen v. Blunt, 2 Wood. & M. 121); or if the adverse party is temporarily within that distance. (Dick v. Runnels, 5 How. 7.) If a known attorney is within that distance, notice must be given to him though he be not attorney of record (Allen v. Blunt, 2 Wood. & M. 121); and where there is an attorney of record, notice must in all cases be given to him (Leiper v. Bickley, 1 Cranch C. C. 29; Barrell v. Simon-ton, 4 Cranch C. C. 70; The Argo, 2 Gall. 314); and in all cases where the United States is a party, notice must be given to the district attorney (The Argo, 2 Gall. 314); but if neither the party nor his attorney are within a hundred miles, no notice need be given. (Dick v. Runnels, 5 How. 7; Miller v. Young, 2 Cranch C. C. 53; Voce v. Lawrence, 4 McLean, 203.) Parol evidence is admissible to prove the party or his attorney was within the distance. (Dick v. Runnels, 5 How. 7.) The notice should be given by the party proposing to take the deposition. (Young v. Davidson, 5 Cranch C. C. 515.) If the deposition was taken without notice, the adverse party may have it taken again (Goodhue v. Bartlett, 5 McLean, 186); or if he objects on that ground, the party who offers the deposition may show that neither he nor his attorney were within one hundred miles at the time. (Smith v. Coleman, 2 Cranch C. C. 237; see Brooks v. Jenkins, 3 McLean, 432.) If the certificate states facts which make it unnecessary to give notice, it need not state that those facts were the reason no notice was given. (Dinsmore v. Maroney, 4 Blatchf. 416; see Shutte v. Thompson, 15 Wall. 151.)

What notice to contain.—The notice should show on its face that the contingency has happened which gives the right to the party to take the deposition (Harris v. Wall, 7 How. 693; but see Debutts v. McCulloh, 1 Cranch C. C. 286; Sage v. Tauszky, 6 Cent. L. J. 7); and the time and place of taking the deposition (Dunlop v. Monroe, 536); and the name of the witness (Carrington v. Stimson, 1 Curt. 437); and if it notifies that it will be

taken between certain hours, it may be taken any time before the last hour named (*House v. Cash*, 2 Cranch C. C. 73); and an hour's notice of the time and place, under special circumstances, is sufficient (*Leiper v. Bickley*, 1 Cranch C. C. 29; *Bowie v. Talbot*, 1 Cranch C. C. 247; *Atkinson v. Glenn*, 4 Cranch C. C. 134); but if the notice is not reasonable, and no necessity exists for a short notice, the deposition cannot be read. (*Jameson v. Willis*, 1 Cranch C. C. 566; *Benner v. Howland*, 2 Cranch C. C. 441.) If the surname is given in the caption to the notice and deposition, it is sufficient. (*Claxton v. Adams*, 1 McAr. 496.) The notice need not require the party to put interrogatories. (*Bussard v. Catalino*, 2 Cranch C. C. 421.)

Service of notice.—The service of the notice must be personal, as no substituted service is authorized. (*Carlington v. Stimson*, 1 Curt. 437.) If served by the marshal, the magistrate should certify thereto (*Harris v. Wall*, 7 How. 693); and the certificate should state that notice was given. (*Jones v. Knowles*, 1 Cranch C. C. 523.) If the suit is instituted against several, if no notice is served on the one summoned, it should be given to those not summoned. (*Brown v. Pratt*, 2 Cranch C. C. 253.)

Attachment of witness.—Before an attachment will be granted it must clearly appear that the commissioner has jurisdiction, and that the witness resides more than one hundred miles from the place of trial (*Ex parte Peck*, 3 Blatchf. 113); and that the facts to which he is called to testify are material and relevant to the issue. (*Ex parte Peck*, 3 Blatchf. 113; *Ex parte Judson*, 3 Blatchf. 148.) A party moving for an attachment must file affidavits showing that witness has committed a contempt, but for merely refusing to answer an interrogatory, an attachment will not issue. (*Ex parte Judson*, 3 Blatchf. 148.)

§ 383. Mode of taking depositions de bene esse.—Every person deposing, as provided in the preceding section, shall be cautioned and sworn to testify the whole truth,

and carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent. (Rev. Stats., sec. 864.)

Examination of witness.—A deposition will not be suppressed, although witnesses are examined on the day fixed in the notice, and on other days, to keep the notice alive till other witnesses appear (*Sage v. Tauszky*, 6 Cent. L. J. 7); but if the notary meets on Saturday, adjourns to Sunday, and then to Monday, those taken on Monday will be suppressed. (*Kirkpatrick v. Balt. & Ohio R. Co.*, 24 Pitts. L. J. 51.) Where the notice states that the taking will be adjourned from day to day, a taking on a regularly adjourned day is admissible. (*Knode v. Williamson*, 17 Wall. 586.) If taken during the session of court, it is the duty of the party and his counsel to be in court, and be ready for trial. (*Bell v. Nimmon*, 4 McLean, 539; *Allen v. Blunt*, 2 Wood. & M. 121.) If taken when the attorney will be unable to reach the court at its commencement, it cannot be read. (*Bell v. Nimmon*, 4 McLean, 539.) The commissioner cannot exclude evidence on the ground that it is not pertinent. (*Ex parte Judson*, 3 Blatchf. 148. See *Grand Haven First Nat. Bank v. Forest*, 44 Fed. Rep. 246; *Re Thomas*, 35 Fed. Rep. 822.) Cross-examination of a witness does not waive objections to his competency. (*Mifflin v. Bingham*, 1 Dall. 272; 1 L. ed. 133); but it waives exceptions to the regularity of his deposition. (*Mechanics' Bank v. Seaton*, 1 Pet. 299.)

Witness to be sworn.—The witness may be sworn after the deposition is reduced to writing. (*Tooker v. Thompson*, 3 McLean, 92.) It is not sufficient to swear him to tell the whole truth touching such interrogatories as may be propounded; he must be sworn to tell the whole truth as far as he knows touching the matter in controversy between the parties (*Shutte v. Thompson*, 15 Wall.

151; *Pendleton v. Forbes*, 1 Cranch C. C. 507; *Garrett v. Woodward*, 2 Cranch C. C. 190; *Rainer v. Haynes*, Hemp. 689; *Wilson S. M. Co. v. Jackson*, 1 Hughes, 295; *United States v. Smith*, 4 Day, 121; and if properly sworn, it is not necessary that he be cautioned (*Brown v. Pratt*, 2 Cranch C. C. 253; *Moore v. Nelson*, 3 McLean, 383; but see *Luther v. The Merritt Hunt*, Newb. Adm. 4); but a certificate that he was cautioned, examined, and sworn is sufficient. (*Edmondson v. Barrell*, 2 Cranch C. C. 228.) If it certifies that the witness affirms from conscientious scruples of taking an oath, it is sufficient. (*Elliott v. Hayman*, 2 Cranch C. C. 378; *Wilson S. M. Co. v. Jackson*, 1 Hughes, 295.)

To be reduced to writing.—The deposition must be reduced to writing by the magistrate himself, or by the witness. (*Bell v. Morrison*, 1 Peters, 351; *Cook v. Burnley*, 11 Wall. 659; *Thorpe v. Simmons*, 2 Cranch C. C. 195; *Rainer v. Haynes*, Hemp. 689; *Marstin v. McRea*, Hemp. 688; *Pettibone v. Derringer*, 4 Wash. C. C. 215.) It must appear that the testimony was reduced to writing in the presence of the magistrate. (*Edmondson v. Barrell*, 2 Cranch C. C. 228; *Rainer v. Haynes*, Hemp. 689.) If the witness copies the deposition from a paper prepared by him, it is sufficient. (*United States v. Smith*, 4 Day, 121.) The deposition must be signed by the witness. (*Thorpe v. Simmons*, 2 Cranch C. C. 195.)

Certificate to deposition.—The act of Congress requires the deposition to be certified by the magistrate (*Harris v. Wall*, 7 How. 693); and the certificate should state the precise caption (*Pendleton v. Forbes*, 1 Cranch C. C. 507); and the place where the deposition is taken should be named (*Tooker v. Thompson*, 3 McLean, 92); and the court in which the case is pending (*Van Ness v. Heineke*, 2 Cranch C. C. 259); and the names of the parties to the suit (*Peyton v. Veitch*, 2 Cranch C. C. 123; *Centre v. Keene*, 2 Cranch C. C. 198; *Smith v. Coleman*, 2 Cranch C. C. 237; *Waskern v. Diamond*, Hemp. 701; *Allen v. Blunt*, 2 Wood. & M. 131; *Buckingham v. Burgess*, 3 McLean, 268); and if the name stated in the caption is correct, an error in stating it in the body of the deposition

will not vitiate it (*Voce v. Lawrence*, 4 McLean, 203); and it may be read, although entitled in the case against one defendant alone. (*Pannill v. Eliason*, 3 Cranch C. C. 358.) If the deposition is written by the magistrate it is sufficient, though not certified to have been written in presence of the witness (*Van Ness v. Heineke*, 2 Cranch C. C. 259; *Vasse v. Smith*, 2 Cranch C. C. 31; *Centre v. Keene*, 2 Cranch C. C. 198); and if he certifies that it was reduced to writing by the witness and himself, it is sufficient. (*Bussard v. Catalino*, 2 Cranch C. C. 421.) If the signature of the witness is on the deposition, the certificate is evidence that he signed it. (*Voce v. Lawrence*, 4 McLean, 203.) The fact that the witness reduced his testimony to writing in the presence of the magistrate may be proved by parol testimony. (*Vasse v. Smith*, 2 Cranch C. C. 31.) The certificate is good evidence of the facts stated therein (*Bell v. Morrison*, 1 Peters, 351; *Banks v. Miller*, 1 Cranch C. C. 543); but if it does not show that the requisites of the statute have been complied with, it cannot be read. (*Thorpe v. Simmons*, 2 Cranch C. C. 195; *Luther v. The Merritt Hunt*, Newb. Adm. 4.) It need not state that the magistrate is not of counsel for either party and not interested in the event of the cause. (*Miller v. Young*, 2 Cranch C. C. 53; *Peyton v. Veitch*, 2 Cranch C. C. 123.) It is not necessary that it should appear in the deposition or certificate that the witness is not a resident of the district. (*Sage v. Tauszky*, 6 Cent. L. J. 7.) If it omits to state whether notice was given, evidence may be given to prove that neither the adverse party nor his attorney were within the distance of one hundred miles (*Travers v. Bell*, 2 Cranch C. C. 160); but the certificate that witness lives at a greater distance is *prima facie* evidence of that fact. (*Patapsco Ins. Co. v. Southgate*, 5 Pet. 604; *Merrill v. Dawson*, Hemp. 563; *Tooker v. Thompson*, 3 McLean, 92.) The word "lives" must be inserted, as it cannot be supplied, so as to show that witness lives more than one hundred miles from the place of trial. (*Dunke v. Worcester*, 5 Biss. 102.) The officer taking the deposition must certify each item of costs before him. (*Russell v. Ashley*, Hemp. 546.)

§ 384. Transmission to the court of depositions de bene esse.—Every deposition taken under the two preceding sections shall be retained by the magistrate taking it until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause. (Rev. Stats., sec. 865.)

Construction.— This section is not to be construed as changing the construction of the statute which it re-enacts, in respect to the time, when depositions *de bene esse* may be opened. (United States v. Tilden, 10 Ben. 171.)

Delivery, how made.—The deposition may be directed to the judge of the court (Thorp v. Orr, 2 Cranch C. C. 335); or to the clerk. (Whitney v. Hunt, 5 Cranch C. C. 120.) If sent by mail the officer should certify that it was retained until it was sealed and sent to the clerk. (Shankwiler v. Reading, 4 McLean, 240.) And if the envelope is sealed and the name of the officer written across the seal, it is sufficient (Thorp v. Orr, 2 Cranch C. C. 335); but if taken by the clerk of the court, it need not be sealed up. (Nelson v. Woodruff, 1 Black, 156.)

If the magistrate does not retain it until he delivers it into court, or seals and directs it, the deposition cannot be read. (Jones v. Neale, 1 Hughes, 268.) No notice of filing need be given to a party who knows that a deposition has been given. (Nelson v. Woodruff, 1 Black, 156.)

Deposition, when read.—A deposition *de bene esse* can be read only when the witness himself is unattainable (The Samuel, 1 Wheat. 9; Wood v. Kellogg, 6 McLean, 44), unless it appears that he cannot attend personally (Park v. Willis, 1 Cranch C. C. 357); and proof of that fact may be given without issuing a subpoena. (Park v. Willis, 1 Cranch C. C. 357; Leatherberry v. Radcliff, 5 Cranch C. C. 550; but see Brown v. Galloway, Pet. C. C. 201.) And the party offering it must prove diligence in endeavoring to procure the witness. (Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Park v. Willis, 1 Cranch C. C. 357; Jones v. Greenolds, 1 Cranch C. C. 339; Penn v. Ingraham, 2 Wash. C. C. 487; Bannert v. Day, 3 Wash. C. C. 343; Pettibone v. Derringer, 4 Wash. C. C. 215; Read v. Bertrand, 4 Wash. C. C. 558.) Where a party knows that the witness has since removed within reach of a subpoena, he is bound to procure his personal attendance. (Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Russell v. Ashley, Hemp. 540.) A deposition may be used although taken from the file with leave of court, and the certificate amended (Leatherberry v. Radcliff, 5 Cranch C. C. 550); but if opened out of court, without consent of the adverse party, it cannot be used (Beale v. Thompson, 8 Cranch, 70; The Roscius, 1 Brown, 442); and consent out of court should be evidenced by writing duly signed. (The Roscius, 1 Brown, 442.) If the attorney appears and cross-examines the witness, it is a waiver of irregularity in the notice (Dinsmore v. Murray, 4 Blatchf. 416), and of all formal objections. (Shutte v. Thompson, 15 Wall. 151; United States v. One Case, 1 Paine, 400.) Where both parties have examined the witness, one party has no right to direct a commissioner to withhold it simply because the testimony has taken him by surprise. (Grand Haven First Nat. Bank v. Forest, 44 Fed. Rep. 246.) In a suit in admiralty, where the interpreter whose services were necessary refused to act further, and another

could not be obtained before witness, whose deposition was being taken *de bene esse*, left the port, the part of deposition taken and signed by the witness is not admissible on the trial. (*Schiaffino v. The Jacob Brandow*, 33 Fed. Rep. 160.) Where a deposition has been read in evidence without opposition, it cannot afterwards be objected to as being irregularly taken. (*Evans v. Hettich*, 7 Wheat. 453; *Brown v. Tarkington*, 3 Wall. 377; *The Georgia v. United States*, 7 Wall. 32.)

Certificate of reasons for taking.—A sufficient cause for taking the deposition cannot be proved by parol evidence. (*Wheaton v. Love*, 1 Cranch C. C. 451.) So if the officer does not assign a sufficient reason for taking it, it will be suppressed. (*Harris v. Wall*, 7 How. 693; *Wheaton v. Love*, 1 Cranch C. C. 451; *Jones v. Knowles*, 1 Cranch C. C. 523; *Shutte v. Thompson*, 15 Wall. 151; *Sage v. Tauszky*, 6 Cent. L. J. 7; *Jones v. Neale*, 2 Mart. (N. C.) 81; *Woodward v. Hall*, 2 Cranch C. C. 235.) The certificate and seal of a notary public are sufficient proof of his authority. (*Dinsmore v. Maroney*, 4 Blatchf. 416.) And so of a mayor, although not certified under his seal. (*Price v. Morris*, 5 McLean, 4.) A certificate without the official seal is not sufficient where he has an official seal, and usually certifies his official acts. (*Paul v. Lowry*, 2 Cranch C. C. 628.) The appointment of a commissioner of a circuit court need not be authenticated by the record (*Whitney v. Hunt*, 5 Cranch C. C. 120); it should be shown by a certificate of the clerk and of the presiding judge. (*Tooker v. Thompson*, 3 McLean, 92.) And the fact that he who certifies to a deposition is an officer may be proved by parol. (*Dunlop v. Monroe*, 1 Cranch C. C. 536; *Paul v. Lowry*, 2 Cranch C. C. 628.) The presumption is, that the officer taking the deposition is the proper officer. (*Vasse v. Smith*, 2 Cranch C. C. 31; *Price v. Morris*, 5 McLean, 4; *Ruggles v. Bucknor*, 1 Paine, 358.)

Objections waived.—Appearance of the party or his attorney, and the examination or cross-examination of the witness without protest or in silence, is a waiver of objection to formal defects (*Shutte v. Thompson*, 15 Wall. 151; *Dinsmore v. Maroney*, 4 Blatchf. 416); if read in evidence,

it is too late to object. (Evans v. Hettich, 7 Wheat. 408; Brown v. Parkington, 3 Wall. 377.) An objection on account of formal defects must be made by motion to suppress, before going to trial. (Claxton v. Adams, 1 McAr. 496.) If depositions are made without notice, the court may allow a continuance to enable the adverse party to cross-examine the witness, or may reject his testimony. (Dade v. Young, 1 Cranch C. C. 123; Straas v. Marine Ins. Co., 1 Cranch C. C. 343; Barrell v. Simonton, 3 Cranch C. C. 681; Allen v. Blint, 2 Wood. & M. 121.) If suppressed, the case may be continued to allow of the taking of another. (Moore v. Nelson, 3 McLean, 383; Luther v. The Merritt Hunt, Newb. Adm. 4.) A waiver of all objections operates as a waiver at a subsequent trial (Edmondson v. Barrell, 2 Cranch C. C. 228); and although waived as to the manner and form of taking it, yet it must be returned by the magistrate, in conformity with this section. (Livingston v. Pratt, Brown Adm. 66.) If on file for three years, it cannot be excluded on the ground of defect on the certificate after the cause is set down for hearing. (Bank v. Travers, 4 Biss. 507.) A party knowing of the incompetency of a witness waives the objection by appearing and cross-examining him, but not if he does not at the time know that fact (U. S. v. One Case, 1 Paine, 400); but the mere presence of the attorney is not a waiver. (Harris v. Wall, 7 How. 693.)

§ 385. Dedimus potestatem and in perpetuam, etc.—In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to make depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in *perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States. And the provisions of

sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five shall not apply to any deposition to be taken under the authority of this section. (Rev. Stats., sec. 866.)

Construction.—This act, being in derogation of the common law, should be strictly construed. (U. S. v. Parrott, 1 McAll. 447.) The preceding sections relating to depositions *de bene esse* do not apply to a *dedimus protestatem*. (Jones v. Oregon Cent. R. R. Co., 3 Sawy. 523.)

How taken.—Depositions may be taken under this section "according to common-law usages," which, as to suits in equity, refers to the practice in equity courts. (Bischoffsheim v. Baltzer, 10 Fed. Rep. 1.) It is not taken "according to common-law usage," if one of the parties writes down the answers for the commissioner in the absence of the other party to the suit. (United States v. Puigs, 4 Fed. Rep. 714.) The common usage refers to practice under state laws (Buddicum v. Kirk, 3 Cranch, 293); and when necessary it may be taken, although the state law does not allow it. (Jones v. Oregon Cent. R. R. Co., 3 Sawy. 523.) A commission may be granted at law, and there is no need to go into equity therefor (Peters v. Prevost, 1 Paine, 64), and the practice in the state courts should be observed. (Sutton v. Mandeville, 1 Cranch C. C. 115.) A commission will not be issued in a suit at law if the witness lives within one hundred miles. (Wellford v. Miller, 1 Cranch C. C. 48; Gustine v. Ringgold, 4 Cranch C. C. 191; Rhoades v. Selin, 4 Wash. C. C. 715.) An examiner may be appointed in an equity case outside as well as inside the jurisdiction (N. C. Railroad Co. v. Drew, 3 Woods, 692); and although the witness lives within the distance of one hundred miles. (Wellford v. Miller, 1 Cranch C. C. 398; Russell v. McClellan, 3 Wood. & M. 157.) The only mode in which a deposition can be taken in a foreign country is under a commission (Stein v. Howard, 13 Peters, 209), although the witness has been previously examined under a commission here. (Winthrop v.

Union Ins. Co., 2 Wash. C. C. 7.) Depositions under a *dedimus potestatem* are not to be considered as taken *de bene esse*. (Sargeant v. Biddle, 4 Wheat. 508.)

Application for commission.—An application must be made in open court, and not at chambers (Peters v. Prevost, 1 Paine, 64); and it must show that the evidence is material. (U. S. v. Parrott, McAll. 447.) It is not granted, of course, but only on sufficient cause shown (U. S. v. Parrott, McAll. 447); and must be founded on affidavit showing it to be necessary to the justice of the case (Sutton v. Mandeville, 1 Cranch C. C. 115); but it need not designate the place at which the deposition is to be taken (Rhoades v. Selin, 4 Wash. C. C. 715); but if it designates the place the commission should conform to it. (Rhoades v. Selin, 4 Wash. C. C. 715.) It may be made to take testimony in a foreign country, although at war with this country. (Peters v. Prevost, 1 Paine, 64.) The notice of a motion for a commission may be served on the attorney of the adverse party. (Potts v. Skinner, 1 Cranch C. C. 57; Bowie v. Talbot, 1 Cranch C. C. 147; Irving v. Sutton, 1 Cranch C. C. 575; Wheaton v. Love, 1 Cranch C. C. 429; Buddicum v. Kirk, 3 Cranch, 293.)

Interrogatories—Practice.—A copy of the interrogatories and written notice of the rule and the names of the commissioners should be served on the adverse party or his attorney. (Merrill v. Dawson, 11 How. 375; Rhoades v. Selin, 4 Wash. C. C. 715.) The interrogatories and cross-interrogatories should be filed in court before issuing the commission. (Cunningham v. Otis, 1 Gall. 166.) The practice is to propose particular interrogatories about matters specially inquired into, and to subjoin a general interrogatory as to any other matter material to the party proposing it. (Rhoades v. Selin, 4 Wash. C. C. 715.) Where the interrogatories are filed according to the rules of court, and the adverse party fails to file cross-interrogatories, the commission may be issued without them (The Norway, 1 Ben. 493), and without notice. (Trevall v. Bache, 5 Cranch C. C. 463.) Exceptions intended to be taken to any particular interrogatories should be propounded as objections before the commission issues, or

they will be deemed waived (*Cocker v. F. H. & B. Co.*, 1 Story, 169); and if the form of the interrogatories cannot be agreed on, they should be referred to a master to settle the form, subject to ultimate review on appeal. (*Cocker v. F. H. & B. Co.*, 1 Story, 169.) An irrelevant interrogatory will be stricken out before the commission issues. (*Cocker v. F. H. & B. Co.*, 1 Story, 169.)

Notice of time and place.—Notice of the time and place of taking the deposition may be served on the party or his attorney. (*Merrill v. Dawson*, 11 How. 375.) It may be given by leaving a true copy thereof with a member of the family. (*Merrill v. Dawson*, 11 How. 375.) If the application does not designate the place, the commissioner should give notice to the adverse party (*Knode v. Williamson*, 17 Wall. 586; *Rhoades v. Selin*, 4 Wash. C. C. 715); but no notice need be given to a party who, after being duly notified, fails to file cross-interrogatories. (*Merrill v. Dawson*, 11 How. 375.) If the notice is sent by mail, it is not sufficient, if not received until after the deposition is taken. (*Walker v. Parker*, 5 Cranch C. C. 639.) If notice is received or waived, the attorney cannot afterwards object on account of no notice. (*Buddicum v. Kirk*, 3 Cranch, 293.) An hour's notice in the place where the attorney resides is sufficient. (*Nicholls v. White*, 1 Cranch C. C. 58.) An affidavit of service of of notice need not state that the person with whom a copy was left was informed of the purport of the notice. (*McCall v. Towers*, 1 Cranch C. C. 41.)

Authority of commissioner.—The authority of the commissioner is special, and must be strictly pursued. (*Gupp v. Brown*, 4 Dall. 410; *Armstrong v. Brown*, 1 Wash. C. C. 43; *Boudereau v. Montgomery*, 4 Wash. C. C. 186.) If issued to several commissioners, yet if it confers powers upon any one of them, a deposition taken by one alone may be read (*The Griffin*, 4 Blatchf. 203; *Lonsdale v. Brown*, 3 Wash. C. C. 404); but if taken by the commissioner in conjunction with a person not named in the commission, it cannot be read. (*Willings v. Consequa*, *Peters* C. C. 301; *Bannert v. Day*, 3 Wash. C. C. 243.) Where a commission is issued to several commissioners,

and executed by a part only, the deposition cannot be read. (Gupp v. Brown, 4 Dall. 410; Armstrong v. Brown, 1 Wash. C. C. 43; Munns v. Dupont, 3 Wash. C. C. 31.) The commissioner is not the agent of the party nominating him. (Gilpins v. Consequa, Peters C. C. 85.) A deposition taken in a foreign country may be read, although it was taken by a judge in the presence of the commissioner. (Winthrop v. Union Ins. Co., 2 Wash. C. C. 7.)

Issuance of commission.—A commission will not be issued until the commissioners are named. (Vanstophorst v. Maryland, 2 Dall. 401.) If issued by consent and without interrogatories, the deposition cannot be read if notice was not given of the time and place for taking it. (Dunlop v. Monroe, 1 Cranch C. C. 536.) If taken by one party it may be read by the adverse party, although the notice was irregular. (Yeaton v. Fry, 5 Cranch, 335.) Whether the party will be required to name the witnesses to be examined depends on the discretion of the court. If taken out to prove pedigree their names will not be required. (Parker v. Nixon, Bald. 291.) Exhibits annexed to a deposition may be taken from the file and be attached to the commission upon filing copies thereof. (Daly v. Maguire, 6 Blatchf. 137.) The commission may be issued to a woman, although the wife of the witness. (The Norway, 2 Ben. 121.) If a party fails to file interrogatories the commission is issued *ex parte*, and interrogatories cannot thereafter be put to the witness. (Merrill v. Dawson, 11 How. 375.)

Proceedings under commission.—The regulation of the proceedings under a commission is a matter in the discretion of the court. (Cunningham v. Otis, 1 Gall. 166.) And the law regulating the proceedings of the court determines the mode in which the witness should be sworn or qualified. (Jones v. Oregon Cent. R. R. Co., 3 Sawy. 523.) The mode of executing such commission is governed by this section, and not by state statutes. (U. S. v. Pings, 4 Fed. Rep. 714.) The commissioner is an officer of the court, with power to take the examination, and he is to exercise this power according to the directions of the commission, which is his chart and guide. (Jones v. Oregon

Cent. R. R. Co., 3 Sawy. 523; *Gilpins v. Consequa*, 3 Wash. C. C. 184.) The deposition must be taken at the time and place designated (*Boudereau v. Montgomery*, 4 Wash. C. C. 186; *Rhoades v. Selin*, 4 Wash. C. C. 715); and the notice naming the day must also name the year (*Knode v. Williamson*, 17 Wall. 586); and on an adjournment from day to day it cannot pass over an intermediate day. (*Buddicum v. Kirk*, 3 Cranch, 293.) The parties cannot appear before the commissioner either in person or by attorney (*Knode v. Williamson*, 17 Wall. 586; *Cunningham v. Otis*, 1 Gall. 166); nor can a witness have a friend to attend and assist him before the commissioner. (*Cunningham v. Otis*, 1 Gall. 166.) Witnesses may be examined, although not named in the commission, where their names and testimony were not discovered until the commission was issued. (*The Infanta*, Abb. Adm. 263.) The interrogatories may be shown to the witness before he is called upon to give his testimony (*North Carolina R. R. Co. v. Drew*, 3 Woods, 692); but no additional interrogatories can be filed. (*Cunningham v. Otis*, 1 Gall. 166.)

Examination of witness.—The witness should be examined as to each interrogatory, and if he omits to answer any, the deposition is not admissible. (*Nelson v. U. S.*, *Peters C. C.* 235; *Kentland v. Bisset*, 1 Wash. C. C. 144; *Wentrop v. Union Ins. Co.*, 2 Wash. C. C. 7.) So if no answer is given to the general interrogatory (*Richardson v. Golden*, 3 Wash. C. C. 109; *Dodge v. Israel*, 3 Wash. C. C. 323); and it is no ground of objection that the material evidence is brought out under that instead of under the preceding special interrogatories. (*Rhoades v. Selin*, 4 Wash. C. C. 715.) Although the answer to an interrogatory would not be legal evidence, the deposition may be read if the interrogatory was not put to the witness. (*Bell v. Davidson*, 3 Wash. C. C. 328.) If the cross-interrogatories are not put to the witness, the deposition cannot be read (*Gilpins v. Consequa*, *Peters C. C.* 88); but it is no objection that they were not put to each witness till after the direct interrogatories were answered by the last witness. (*Gilpins v. Consequa*, *Peters C. C.* 88.) On a commission issued *ex parte* the party may

put as many or as few interrogatories as he thinks proper, but the last must be put. (*Merrill v. Dawson*, 11 How. 375.)

To be reduced to writing.—The deposition may be reduced to writing by the magistrate or by the deponent, in the presence of the magistrate (*Stockwell v. U. S.*, 2 Cliff. 284); it is immaterial in whose handwriting it is (*Kane v. Meade*, 3 Peters, 1); but it will be suppressed if the answers of the witness are written down by counsel for the party who procured the commission. (*U. S. v. Pings*, 4 Fed. Rep. 714; but see *Nicholls v. White*, 1 Cranch C. C. 58; *Atkinson v. Glenn*, 4 Cranch C. C. 134.) It is not necessary that the deposition be signed by the witness (*Ketland v. Bissett*, 1 Wash. C. C. 144); and if prepared and signed by the witness before the oath is administered, it is improper. (*Dodge v. Israel*, 4 Wash. C. C. 323; *N. C. Railroad Co. v. Drew*, 3 Woods, 692.) If the commission is issued to an alien, it may be written in the English language, though it does not appear that there was a sworn interpreter. (*Gilpins v. Consequa*, Peters C. C. 88.)

Return.—The return must show that the commissioner took the oath annexed to the commission (*Frevall v. Bache*, 5 Cranch C. C. 463; but see *Gilpins v. Consequa*, 3 Wash. C. C. 184); and the return that he took the oath is sufficient evidence that it was properly administered. (*Winter v. Simonton*, 3 Cranch C. C. 104.) Where the deposition was taken by a commissioner of the circuit court it need not appear that he was sworn. (*Hoyt v. Hamme-kin*, 14 How. 346.) It should appear by the certificate or by other evidence that the examination was conducted at the time and place designated (*Jones v. Oregon Cent. R. R. Co.*, 4 Sawy. 523; *Rhoades v. Selin*, 4 Wash. C. C. 715); and his certificate is *prima facie* evidence thereof. (*Boudereau v. Montgomery*, 4 Wash. C. C. 186.) The return need not show that the witness was cautioned before being sworn, nor need it set out the form of the oath; that he was duly sworn is sufficient. (*Keene v. Meade*, 3 Peters, 1; *Jones v. Oregon Cent. R. R. Co.*, 3 Sawy. 523.) The commissioners need not certify in whose handwriting the deposition was taken down. (*Jones v. Oregon Cent.*

R. R. Co., 3 Sawy. 533.) If exhibits are referred to by the witness, they should be annexed to the deposition, with marks or references to show that they are the identical ones referred to. (Dodge v. Israel, 4 Wash. C. C. 323.) If the commissioner states in the caption of the deposition that it was taken in pursuance of the commission, an omission therein of the names of one of the parties named in the commission will not render it inadmissible (Merrill v. Dawson, 11 How. 375); so the insertion of a wrong middle letter in the name of one of the parties may be corrected, on motion, upon the return of the commission. (Keene v. Meade, 3 Peters, 1.) The envelope may be directed to the chief judge of the court (Frevall v. Bache, 5 Cranch C. C. 463); and if opened before it comes into the hands of the clerk, it may be set aside and a new commission be issued. (U. S. v. Price, 2 Wash. C. C. 356.) The return is *prima facie* evidence of the facts stated therein as to the execution of the commission. (Winter v. Simonton, 3 Cranch C. C. 104; Boudereau v. Montgomery, 4 Wash. C. C. 186.)

Objections.—A party who unites in issuing a commission cannot afterwards object to it on the ground that the witness lives within the distance of one hundred miles (Sergeant v. Biddle, 4 Wheat. 508; Ridgeway v. Ghequier, 1 Cranch C. C. 4); but it cannot be read in an action at law if the witness, at the time of the trial, is in the place where the court is held, and is able to attend (Weed v. Kellogg, 6 McLean, 44); nor can a party who joins in a commission object that it was issued improperly or improvidently (Sergeant v. Biddle, 4 Wheat. 508); so irregularities are waived by appearing and cross-questioning the witness. (Mechanics' Bank v. Seton, 1 Peters, 299.) Objections to irregularities not taken and noted when the deposition is taken, and by motion to suppress before the trial has begun, will be deemed waived (Doane v. Glenn, 21 Wall. 33; York Co. v. Central Railroad, 3 Wall. 107; Blackburn v. Crawford, 3 Wall. 175); an objection to the omission to produce a memorandum referred to can be taken only by motion to suppress (Blackburn v. Crawford, 3 Wall. 175); so where the witness fails to produce a copy of a prior deposition. (Winans v. N. Y. & Erie R. R. Co., 21 How.

88.) A waiver of notice of the taking of a deposition may be inferred from the conduct of the party or his attorney (Buddicum v. Kirk, 3 Cranch, 293); but a party may take exceptions to it that were not taken at the time it was returned and opened (Walker v. Parker, 5 Cranch C. C. 639); so on objection to the answer to a leading interrogatory, the deposition will be referred to a master to inquire if the interrogatory is leading. (Boudereau v. Montgomery, 4 Wash. C. C. 186.) The party at whose instance a deposition was taken may read the answer to a cross-interrogatory, although the answer to a direct interrogatory was suppressed. (Alsop v. Commercial Ins. Co., 1 Sum. 451.) The failure of a party to note objections to depositions when taken or to present them by motion to suppress is a waiver of the objections. (Howard v. Stillwell etc. Co., 139 U. S. 199.) Where questions put to a witness were unobjectionable, and the answers were responsive, and not hearsay, objections taken are frivolous. (Gregory Consol. M. Co. v. Starr, 141 U. S. 222.)

§ 386. Depositions in perpetuum admissibile.—Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken in *perpetuum rei memoriam*, which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof. (Rev. Stats., sec. 867.)

Note.—If the deposition in *perpetuum rei memoriam* is not admissible in the state court, it is not admissible in the federal court. (Gould v. Gould, 3 Story, 516.) Where the remedy exists under section 866, an application under this section will be denied. (Richter v. Jerome, 115 U. S. 55.)

§ 387. Depositions under a dedimus potestatem.—When a commission is issued by any court of the United States for taking the

testimony of a witness named therein at any place within any district or territory, the clerk of any court of the United States for such district or territory shall, on the application of either party to the suit, or of his agent, issue a subpoena for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpoena; and if any witness, after being duly served with such subpoena, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpoena, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpoena to testify issued by such court. (Rev. Stats., sec. 868.)

Note.—This section was intended to authorize the procuring by means of a commission, when necessary, any evidence that might be procured upon a trial. (In re Shepard, 18 Blatchf. 227; S. C., 3 Fed. Rep. 12.) The commission must be accompanied by written interrogatories, and furnish information as to the inquiry, or the court cannot determine the question as to his refusal to answer a proper question. (In re Glaser, 2 Bank. Reg. 398; see Sergeant v. Biddle, 4 Wheat. 508; York Co. v. Cent. R. R., 3 Wall. 113.)

§ 388. Subpoena duces tecum under a dedimus potestatem.—When either party in such suit applies to any judge of a United

States court in such district or territory for a subpoena commanding a witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpoena, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document, supposed to be in the possession or power of such witness, and to be described in the subpoena, such judge, on being satisfied by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party applying therefor, may order the clerk of said court to issue such subpoena accordingly. And if the witness, after being served with such subpoena, fails to produce to the commissioner, at the time and place stated in the subpoena, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpoena, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpoena, or punish the disobedience in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the

cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties. (Rev. Stats., sec. 869.)

A subpoena duces tecum may issue to witness to be examined on a commission. (In re Shepard, 18 Blatchf. 226; S. C., 3 Fed. Rep. 12. The writ is expressly confined to the production of "any paper or writing or written instrument or book or other document." (In re Shepard, 18 Blatchf. 226.) It cannot issue to a witness not a party to a suit to compel him to bring before the court patterns for a stove. (In re Shepard, 18 Blatchf. 226.) A defendant cannot be compelled to make discoveries in answer to a bill which seeks to enforce penalties and forfeitures against him by means of such discoveries. (Atwill v. Ferrett, 2 Blatchf. 39.) The defendant cannot be compelled, under a subpoena *duces tecum*, to produce his books and papers and plates to be used in evidence for plaintiff. (Johnson v. Donaldson, 18 Blatchf. 287; S. C., 3 Fed. Rep. 22.) A motion to compel such testimony will not be granted in aid of an action for trespass for the violation of a copyright. (Atwill v. Ferrett, 2 Blatchf. 39.) The relief will only be to the extent of the part infringed. (Story v. Holcomb, 4 McLean, 306.) The various provisions of the law should be liberally construed to give effect to what may be considered the inherent right of the author to his work (Myers v. Callahan, 5 Fed. Rep. 726); but equity will not, at the instance of the author, where he has made an assignment forever, restrain the assignee from selling after a renewal taken out by the author. (Paige v. Banks, 7 Blatchf. 152.) The right to a chart is violated only when another copies from the chart of him who has secured the copyright. (Blunt v. Patten, 2 Paine, 398; compare Gray v. Russell, 1 Story, 11; Emerson v. Davies, 3 Story, 768.) The publication of a map made from materials collected while in the service of the government as draughtsman belongs to the government. (Commonwealth v. Desilvan, 3 Phila. 31; see Heine v. Appleton, 4 Blatchf. 125.) Compiling maps of a city of a particular design from public records into an atlas, and

without taking out a copyright making several copies and selling them, and placing one copy in the hands of the city for public use, is a dedication to public use (*Rees v. Peltzer*, 75 Ill. 475); but depositing one chart in the navy department does not make it public property. (*Blunt v. Patten*, 2 Paine, 307.) A single sheet containing diagrams is a subject of copyright; the form of the publication is immaterial (*Drury v. Ewing*, 1 Bond, 540); but an advertising card is not. (See *Ehret v. Pierce*, 10 Fed. Rep. 553; see *United States v. Hall*, 44 Fed. Rep. 883.)

§ 389. Witness under a *dedimus potestatem*.—No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpoena directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day's attendance at the place of examination are paid or tendered to him at the time of the service of the subpoena. (Rev. Stats., sec. 870.)

§ 390. Depositions in District of Columbia in suits pending elsewhere.—When a commission to take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any state or territorial or foreign court, is issued from such court, or a notice to the same effect is given according to its rules of practice, and such commission or notice is produced to a justice

of the supreme court of said district, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners named in the commission or notice, to testify in such suit, at a time and at a place within said district therein specified. (Rev. Stats., sec. 871.)

§ 391. When no commission nor notice.
—When it satisfactorily appears by affidavit to any justice of the supreme court of the District of Columbia, or to any commissioner for taking depositions appointed by said court,—

First. That any person within said district is a material witness for either party in a suit pending in any state or territorial or foreign court;

Second. That no commission nor notice to take the testimony of such witness has been issued or given; and

Third. That, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence and consent of both parties will be received on the trial or hearing thereof,—such officer shall issue his summons, requiring the witness to appear before him at a place within the district, at some reasonable time, to be stated therein, to testify in such suit. (Rev. Stats., sec. 872.)

§ 392. Manner of taking and transmitting the deposition.—Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit. (Rev. Stats., sec. 873.)

§ 393. Witness fees.—Every witness appearing and testifying under the said provisions relating to the District of Columbia shall be entitled to receive for each day's attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance. (Rev. Stats., sec. 874.)

§ 394. Letters rogatory from United States courts.—When any commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, is executed by the court or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States

nearest the place where it is executed. On receiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he received it; and he shall thereupon transmit the said letter or commission, so executed and certified, by mail, to the clerk of the court from which the same issued, in the manner in which his official dispatches are transmitted to the government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without objection as to the method of returning the same. [See secs. 4071, 4074.] (Rev. Stats., sec. 875.)

Note. — Depositions under the letters rogatory are not subject to the strict rules of taking depositions. (Nelson v. United States, Pet. C. C. 235.)

§ 395. Letters rogatory from foreign courts.— When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by such court to make the examination of the witnesses mentioned in said letters shall have power to compel the witness to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts. (19 U. S. Stats. 241.)

§ 396. Subpœnas for witnesses to run into another district.—Subpœnas for witnesses who are required to attend a court of the United States, in any district, may run into any other district; *provided*, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same. (Rev. Stats., sec. 876.)

Note. — If a witness lives within one hundred miles of the place of trial, and he fails to attend when subpoenaed, the court may send an attachment to be executed in another district (U. S. v. Williams, 4 Cranch C. C. 372); and whether he lives beyond the distance or not is to be determined by the actual distance by usual routes. (Ex parte Beebes, 2 Wall. Jr. 127.) A subpoena cannot be issued for a witness residing more than one hundred miles from the place of trial. (Henry v. Ricketts, 1 Cranch C. C. 580.) The privilege of a witness protects him so as to give him a reasonable time after the disposition of the cause to go home. (Atchison v. Morris, 11 Fed. Rep. 582; 11 Biss. 191.) A party going into another state as a witness, or as a party under process of a court, is exempt from process in such state while necessarily attending there in respect to such trial. (Brooks v. Farwell, 4 Fed. Rep. 167; 2 McCrary, 220; citing Parker v. Hotchkiss, 1 Wall. Jr. 269; The Juneau Bank v. McSpedan, 5 Biss. 64; and see In re Healy, 24 Alb. L. J. 529.) So a party, while in another state attending a regular examination of witnesses, is privileged. (Plimpton v. Winslow, 9 Fed. Rep. 365; 20 Blatchf. 82. See, as to privilege of witnesses and suitors, Larned v. Griffin, 12 Fed. Rep. 590; Atchison v. Morris, 11 Fed. Rep. 582; 11 Biss. 191; Matthews v. Puffer, 10 Fed. Rep. 606; 20 Blatchf. 233.)

§ 397. Witnesses—Form of a subpoena—Attendance.—Witnesses who are required to attend any term of a circuit or district court

on the part of the United States shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney. (Rev. Stats., sec. 877.)

§ 398. Witnesses in behalf of indigent defendants in criminal cases.—Whenever any person indicted in a court of the United States makes affidavit, setting forth that there are witnesses whose evidence is material to his defense; that he cannot safely go to trial without them; what he expects to prove by each of them; that they are within the district in which the court is held, or within one hundred miles of the place of trial; and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, —the court in term, or any judge thereof in vacation, may order that such witnesses be subpoenaed if found within the limits aforesaid. In such case the costs incurred by the process and the fees of the witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States. (Rev. Stats., sec. 878.)

§ 399. Recognizance of witnesses.—Any judge or other officer who may be author-

ized to arrest and imprison or bail persons charged with any crime or offense against the United States may, at the hearing of any such charge, require of any witness produced against the prisoner, on pain of imprisonment, a recognizance, with or without sureties, in his discretion, for his appearance to testify in the case. And where the crime or offense is charged to have been committed on the high seas, or elsewhere within the admiralty and maritime jurisdiction of the United States, he may, in his discretion, require a like recognizance, with such sureties as he may deem necessary, of any witness produced in behalf of the accused, whose testimony in his opinion is important, and is in danger of being otherwise lost. (Rev. Stats., sec. 879.)

§ 400. Vermont—Recognizance of witnesses, how taken.—In the district of Vermont all recognizances of witness, taken by any magistrate in said district, for their appearance to testify in any case cognizable either in the district or circuit court thereof, shall be to the circuit court next thereafter to be held in the said district. (Rev. Stats., sec. 880.)

§ 401. Recognizance of witnesses on application of district attorney.—Any judge of the United States, on the application of a district attorney, and on being satisfied by proof that the testimony of any person is competent and will be necessary on the trial of any crim-

inal proceeding in which the United States are parties or are interested, may compel such person to give recognizance, with or without sureties, at his discretion, to appear to testify therein; and for that purpose may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute process in behalf of the United States, to arrest and bring before him such person. If the person so arrested neglects or refuses to give recognizance in the manner required, the judge may issue a warrant of commitment against him, and the officer shall convey him to the prison mentioned therein. And the said person shall remain in confinement until he is removed to the court for the purpose of giving his testimony, or until he gives the recognizance required by said judge. (Rev. Stats., sec. 881.)

§ 402. Copies of department records and papers.—Copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof. (Rev. Stats., sec. 882.)

Copies of records.—The words “papers or documents” mean only such as are made by an officer or an agent of the government in the discharge of his official duty (Block v. U. S., 7 Ct. of Cl. 406); and a copy of such is not competent evidence unless it was the duty of the officer to file the original. (Block v. U. S., 7 Ct. of Cl. 406.)

In a case where the government is the adverse party, certified copies must be procured, as a mere notice to produce the original is not sufficient. (*Barney v. Schneider*, 9 Wall. 248; *Chadwick v. U. S.*, 3 Fed. Rep. 750.) Copies of documents in the immediate custody of the treasury department may be authenticated by the secretary or assistant secretaries, under the seal of the department. (*Chadwick v. U. S.*, 3 Fed. Rep. 753.) The mode of authentication prescribed by statute must be strictly pursued. (*Block v. U. S.*, 7 Ct. of Cl. 406.) If the officer having charge of the paper certifies that it is a true copy, and the head of the department certifies to the official character of such officer, it is sufficiently authenticated. (*Thompson v. Smith*, 2 Bond, 320.) A certificate by the acting commissioner of Indian affairs, whose official character is certified by the secretary of the interior, is sufficient. (*Stephens v. Westwood*, 25 Ala. 716.) A certificate of the secretary of state, under seal of the department of state, is evidence to prove the official character of an accredited minister, and the date of his recognition. (*U. S. v. Benner*, Bald, 234; *U. S. v. Liddle*, 2 Wash. C. C. 505.) If a paper is signed by a secretary of the treasury, and authenticated by the seal of that department, it is sufficient (*U. S. v. Hunt*, 13 Fed. Rep. 240; *White v. St. Guirons*, Minor, 331); so of the copy of a collector's bond (*Chadwick v. U. S.*, 3 Fed. Rep. 750); so of the copy of a return certified by the assistant secretary of the treasury, under seal of the department. (*Chadwick v. U. S.*, 3 Fed. Rep. 750.) A copy of a vessel's register certified by the registrar, and his official character attested by the secretary of the treasury on seal of the department, is competent evidence. (*Carlett v. Pac. Ins. Co.*, 1 Paine, 594; *Bleecker v. Bond*, 3 Wash. C. C. 529.) A certified copy of a paper on file in the office of a quartermaster-general, under seal of the department, is competent evidence. (*Thompson v. Smith*, 2 Bond, 320; *Crowell v. Hopkinton*, 45 N. H. 9; see *Wetmore v. U. S.*, 10 Peters, 647.) A copy of an adjudication of a claim in the treasury department, certified by an auditor alone, without the seal of the department, is not competent evidence. (*Wickliffe v. Hill*, 3 Litt. 330.) A duly certified transcript from the books and proceedings of the treasury department is

prima facie evidence of the facts stated therein. (U. S. v. Eckford, 1 How. 250; Walton v. U. S., 9 Wheat. 651; Soule v. U. S., 100 U. S. 8; U. S. v. Eggleston, 4 Sawy. 199.) A certificate of the treasury department, declaring an account contained in the treasury transcript to be an account between the United States and the collector of internal revenue, has the legal effect of making the treasury transcript *prima facie* evidence of the fact of indebtedness which it certifies (U. S. v. Hunt, 13 Fed. Rep. 240, note), unless upon the face of the account it necessarily appears to be otherwise. (U. S. v. Hunt, 13 Fed. Rep. 240, note.) Excluding a certified treasury transcript when offered in evidence is error. (U. S. v. Hunt, 13 Fed. Rep. 240.) If the execution of the official bond is denied, it cannot be proven by a copy certified by the secretary of the treasury under the section. (U. S. v. Humason, 8 Fed. Rep. 71; 7 Sawy. 252.)

§ 403. Copies of records, etc., in office of solicitor of the treasury.—Copies of any documents, records, books, or papers in the office of the solicitor of the treasury, certified by him under the seal of his office, or, when his office is vacant, by the officer acting as solicitor for the time, shall be evidence equally with the originals. (Rev. Stats., sec. 883.)

§ 404. Instruments, etc., of comptroller of the currency.—Every certificate, assignment, and conveyance executed by the comptroller of the currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly

on the paper shall be as valid as if made on wax or wafer. (Rev. Stats., sec. 884.)

§ 405. Organization certificates of national banks.—Copies of the organization certificate of any national banking association, duly certified by the comptroller of the currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate. (Rev. Stats., sec. 885.)

Note.—A copy certified and sealed by the comptroller of the currency is sufficient. (First Nat. Bank v. Kidd, 20 Minn. 234.) A certificate is sufficient in the absence of any evidence that there is any other bank of the same name at the same place. (Washington Co. Nat. Bank v. Lee, 11 Mass. 521.)

§ 406. Transcripts from books, etc., of the treasury.—When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the treasury department, certified by the register and authenticated under the seal of the department, or, when the suit involves the accounts of the war or navy departments, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the treasury department, shall be admitted as evidence, and

the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the register, or by such auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court; *provided*, that where suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit. (Rev. Stats., sec. 886.)

Note.—This section extends to every delinquency (Bechtel v. U. S., 101 U. S. 597), and applies to a surety as well as the delinquent principal. (U. S. v. Gaussen, 19 Wall. 198.)

Certified transcript as evidence.—Where copies are made evidence by statute, the mode of authentication must be strictly pursued. (Smith v. U. S., 5 Pet. 292.) A duly certified copy of a bond is competent evidence. (U. S. v. Vanzandt, 2 Cranch C. C. 338; U. S. v. Griffith,

2 Cranch C. C. 366; U. S. v. Lent, 1 Paine, 117.) It is the certificate of the auditor and seal of the department which makes the transcript evidence, and neither must be omitted. (Smith v. U. S., 5 Pet. 292.) It is admissible although signed by the chief clerk of the treasury. (Smith v. U. S., 5 Pet. 292.) It is evidence that an officer received money charged against him (Bruce v. U. S., 17 How. 437); it is competent whenever the party is charged with money advanced to him by the United States, for which he has to account (U. S. v. Lee, 2 Cranch C. C. 462); but if the receipt is not acknowledged by him in his returns, or the money charged was not regularly advanced, it is not competent without other evidence of the items. (U. S. v. Hilliard, 3 McLean, 324.) If all the items on which the balance is struck are regularly entered and brought forward, the statement is competent evidence (Gratiot v. U. S., 15 Pet. 336); and it is sufficient if it contains the accounts, debts, and credits, as acted upon by the accounting officers. (Hoyt v. U. S., 10 How. 109; U. S. v. Patterson, Gilp. 44; U. S. v. Martin, 2 Paine, 68.) So a transcript from the ledger is admissible. (U. S. v. Gaussen, 19 Wall. 198.) The statement is *prima facie* evidence only. (U. S. v. Gaussen, 19 Wall. 198; U. S. v. Eckford, 1 How. 250; U. S. v. Corwin, 1 Bond, 149; U. S. v. Reymert, 1 Int. Rev. Rec. 63.) It is sufficient evidence although the debtor did not have notice of the adjustment of his account. (Watkins v. U. S., 9 Wall. 759.) It can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department on whose books the transactions are shown (U. S. v. Buford, 3 Pet. 12; U. S. v. Jones, 8 Pet. 375); but a disbursement made on a bill of exchange cannot be proved by the statement alone. (U. S. v. Jones, 8 Pet. 375.) So if an account does not arise in the ordinary mode of doing business in the department, its transcript is not competent evidence to establish it. (U. S. v. Buford, 3 Pet. 12.) The transcript must be made "from the books," and not of the books (U. S. v. Gaussen, 19 Wall. 198); and the act making such transcript evidence does not mean a statement of an account in gross, but a statement of the items acted upon by the accounting officers. (U. S. v. Jones, 8 Pet. 375; U. S. v. Vanzandt, 2 Cranch C. C. 338;

U. S. v. Kuhn, 4 Cranch C. C. 401; **U. S. v. Edward**, 1 McLean, 467.) A certified copy of the account rendered by the principal is competent evidence against the surety. (**U. S. v. Vanzandt**, 2 Cranch C. C. 338; **U. S. v. Gaussen**, 19 Wall. 198.) If an error is made in favor of sureties, it may be corrected and the balance stated (**Soule v. U. S.**, 100 U. S. 8); but the accounting officers having once stated an account, they cannot subsequently vary the debit side to the prejudice of the debtor (**U. S. v. Collier**, 3 Blatchf. 325; **Ex parte Randolph**, 2 Brock. 447); and defendant, by accepting the credits given him, does not waive any objection to items on the debit side. (**U. S. v. Jones**, 8 Pet. 375.) The officers of the treasury may certify facts within their official knowledge (**U. S. v. Jones**, 8 Pet. 375; **U. S. v. Kuhn**, 4 Cranch C. C. 401); and if the transcript shows the capacity in which defendant acted, it is evidence of such fact. (**U. S. v. Smith**, 5 Pet. 292.) Where the government holds a person responsible for the acts of his agent, the agency must be made to appear by a certified copy of the power. (**U. S. v. Jones**, 8 Pet. 375.) A transcript of the amount expended by the officers on default of a contractor to furnish articles according to contract is competent evidence. (**U. S. v. Griffith**, 2 Cranch C. C. 366.) If a bond is annexed to the transcript it may properly be certified as a part of it. (**Chadwick v. U. S.**, 3 Fed. Rep. 752.) A copy of an official bond certified by the register of the treasury under seal of the department is sufficient proof of its execution. (**U. S. v. Humason**, 3 Fed. Rep. 71; 7 Saw. 252.)

§ 407. **Books of the treasury.**—Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the treasury department, as provided by the preceding section. (Rev. Stats., sec. 887.)

§ 408. Copies of returns in returns office.—A copy of any return of a contract returned and filed in the returns office of the department of the interior, as provided by law, when certified by the clerk of the said office to be full and complete, and when authenticated by the seal of the department, shall be evidence in any prosecution against any officer for falsely and corruptly swearing to the affidavit required by law to be made by such officer in making his return of any contract, as required by law, to said returns office. (Rev. Stats., sec. 888.)

§ 409. Copies of post-office records.—Copies of the quarterly returns of postmasters, and of any papers pertaining to the accounts in the office of the sixth auditor, and transcripts from the money-order account-books of the post-office department, when certified by the sixth auditor under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits. (Rev. Stats., sec. 889.)

Note.—A statement of account is competent evidence,

although it does not purport to contain the credits claimed and allowed (U. S. v. Harrill, 1 McAll. 243), or the credits claimed and disallowed. (U. S. v. Hodge, 13 How. 478; see U. S. v. Hilliard, 3 McLean, 324.) An account which gives the balances as due on the quarterly returns is sufficient. (U. S. v. Hodge, 13 How. 478; Lawrence v. U. S., 2 McLean, 581; U. S. v. Hilliard, 3 McLean, 324; U. S. v. Harrill, 1 McAll. 243; Postmaster-General v. Rice, Gilp. 554.) So a certificate that a paper is a true and correct copy of the account is sufficient (U. S. v. Harrill, 1 McAll. 243), and a copy of the bond duly authenticated is competent evidence. (U. S. v. Wilkinson, 12 How. 246.)

§ 410. Copies of statements of demands by post-office department.—In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the sixth auditor, of the statement of any postmaster, special agent, or other person, employed by the postmaster-general or the auditor for that purpose, that he has mailed a letter to such delinquent postmaster at the post-office where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the ordinary course of the mail; and that payment of such balance has not been received, within the time designated in his instructions,—shall be received as sufficient evidence in the courts of the United States, or other courts, that a demand has been made upon the delinquent postmaster; but when the account of a late postmaster has been once adjusted and settled, and a demand has been made for the balance appearing to be due, and afterward allowances

are made or credits entered, it shall not be necessary to make a further demand for the new balance found to be due. (Rev. Stats., sec. 890.)

§ 411. Copies of records, etc., of general land-office.—Copies of any records, books, or papers in the general land-office, authenticated by the seal and certified by the commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record. (Rev. Stats., sec. 891.)

Copies of records, etc., in land-office.—An exemplification of any record or paper of record in the land-office is evidence of equal dignity with the original (Lee v. Getty, 26 Ill. 76; Davis v. Freeland, 32 Miss. 645), as of a patent certified by the commissioner of the general land-office (Hines v. Greenlee, 3 Ala. 73; Smith v. Mosier, 5 Blatchf. 51; Stephenson v. Wait, 8 Blatchf. 508; Lane v. Bonnielman, 17 Ill. 95; Lacey v. Davis, 4 Mich. 140; Barton v. Murrain, 27 Mo. 235; Avery v. Adams, 69 Mo. 603); but this section does not dispense with signing and countersigning the patent (McGarrahan v. Mining Co., 96 U. S. 316); but if it is signed and countersigned, and verified by the seal of the general land-office, it is competent evidence. (Bowser v. Warren, 4 Blatchf. 522.) The form of the certificate is regulated by act of Congress, and is not affected by state laws (Gillman v. Rigpelle, 18 Mich. 145); and a certificate by the acting commissioner under seal of the general land-office is sufficient. (Stephens v. Westwood, 25 Ala. 716.) The seal and the signature of

the commissioner *prima facie* prove themselves. (Harris v. Barnett, 4 Blatchf. 369; Bowser v. Warren, 4 Blatchf. 522.) A paper may be admitted in evidence, although it contains matters which the certificate does not cover, if authenticated in due form. (Gillman v. Rigpelle, 18 Mich. 145.) So a copy of a plat and description duly authenticated is admissible in evidence. (Harris v. Barnett, 4 Blatchf. 369; see Godfrey v. Beardsley, 2 McLean, 412.) The documents which make up the original title papers belong to the public archives, and a certified copy thereof is competent evidence (Hanrick v. Barton, 16 Wall. 166); or a certificate of the receiver that a party has made full payment is evidence that he has taken the necessary steps for a pre-emption (Donaldson v. Edmunds, 44 Cal. 328); but a copy of a final certificate and an assignment thereof is not competent evidence to prove the assignment (Scott v. Hancock, 3 Stew. & P. 44); nor is a letter of a commissioner to a register and receiver not duly authenticated admissible to prove the facts therein stated. (Booce v. McLean, 24 Wis. 225.) This section is ample authority for the introduction in evidence of the transcript of the German land-office. (Culver v. Uthe, 133 U. S. 655.)

§ 412. Copies of records, etc., of patent office.—Written or printed copies of any records, books, papers, or drawings belonging to the patent office, and of letters patent authenticated by the seal and certified by the commissioner or acting commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor, and paying the fee required by law, shall have certified copies thereof. (Rev. Stats., sec. 892.)

Copies of record.—A demand for a copy of a record, accompanied by rudeness and insult, is not a legal demand; nevertheless a party on a second demand is entitled to a copy, and it is error to refuse to comply.

(*Boyden v. Burke*, 14 How. 575.) An exemplification of a patent and the specification is admissible in evidence, although the drawing is not exemplified (*Peck v. Farrington*, 9 Wend. 44); but a copy of the specification alone is not competent, the proper evidence being the patent itself, duly authenticated by the official seal and certificate of the commissioner. (*Davis v. Gray*, 17 Ohio St. 330.) A transcript of certain documents on file in the patent office is competent, although not a transcript of the whole proceeding. (*Toohey v. Harding*, 1 Fed. Rep. 174; 4 Hughes, 253.) A certified copy of an assignment is *prima facie* evidence of the genuineness of the original. (*Lee v. Blandy*, 1 Bond, 361; *Brooks v. Jenkins*, 3 McLean, 432; *Parker v. Haworth*, 4 McLean, 370); but a certified copy of a transfer not required by law to be recorded is not legal proof of the transfer. (*Sherman v. Champlain Co.*, 31 Vt. 162.) Where a party desires to prove a negative, as that there is no record, he must do so by the deposition of the proper officer, and by producing him in court to be examined (*Stoner v. Ellis*, 6 Ind. 152; *Bullock v. Wallingford*, 55 N. H. 619); and a mere certificate that diligent search has been made is not sufficient. (*Bullock v. Wallingford*, 55 N. H. 619.) A clerk whose employment is examination in relation to assignments and records is a competent witness. (*Stone v. Palmer*, 28 Mo. 539.) Certified copies of patents are admissible in evidence in all cases where the originals would be admitted. (*Schoerken v. The Swift etc. Co.*, 7 Fed. Rep. 469; 19 Blatchf. 209.)

§ 413. Copies of foreign letters patent.

—Copies of the specifications and drawings of foreign letters patent, certified as provided in the preceding section, shall be *prima facie* evidence of the fact of the granting of such letters patent, and of the date and contents thereof. (Rev. Stats., sec. 893.)

Note.—Authenticated copies of foreign patents are *prima facie* evidence of the granting thereof. (*Schoerken v. The Swift etc. Co.*, 7 Fed. Rep. 470.)

§ 414. Printed copies of specifications and drawings of patents.—The printed copies of specifications and drawings of patents, which the commissioner of patents is authorized to print for gratuitous distribution, and to deposit in the capitols of the states and territories, and in the clerks' offices of the district courts, shall, when certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein contained. (Rev. Stats., sec. 894.)

§ 415. Extracts from the journals of Congress.—Extracts from the journals of the Senate, or of the House of Representatives, and of the executive journal of the Senate when the injunction of secrecy is removed, certified by the secretary of the Senate or by the clerk of the House of Representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have if produced and authenticated in court. (Rev. Stats., sec. 895.)

§ 416. Copies of records, etc., in offices of United States consuls, etc.—Copies of all official documents and papers in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of

the United States. [See sec. 1707.] (Rev. Stats., sec. 896.)

Consul's certificate.—The certificate of a consul is competent evidence to prove his official acts (The Independence, Crabbe, 54); but not acts which are not his official acts (The Independence, Crabbe, 54); as of the arrival and departure of a vessel, and of the refusal of the master to deposit the register (Levy v. Burley, 2 Sum. 355); nor is it competent evidence to prove the facts to justify the imprisonment of a seaman by the master in a foreign port. (The Coriolanus, Crabbe, 239.) It is not competent evidence to prove a foreign law. (Church v. Hubbard, 2 Cranch, 187.) It is not evidence of any fact, as between third persons, unless expressly or impliedly so made by statute. (Levy v. Burley, 2 Sum. 355; Church v. Hubbard, 2 Cranch, 187; U. S. v. Mitchell, 2 Wash. C. C. 188; The Alice, 12 Fed. Rep. 923.) The certificate under seal of his office is competent evidence to prove the fact that the ship's papers were lodged with him (U. S. v. Mitchell, 2 Wash. C. C. 478); or that a seaman was discharged in a foreign port with his own consent. (Lamb v. Briard, Abb. Adm. 367.) It is *prima facie* evidence of the violation of law by a master refusing to receive a destitute seaman in a foreign port when it sets out all the facts essential. (Matthews v. Offley, 3 Sum. 115.) Where the impression of the seal on a consular certificate is too indistinct to be deciphered, and the signature vague, it is not admissible in evidence. (The Atlantic, Abb. Adm. 451.)

§ 417. Books and papers in offices of certain districts.—The transcripts into new books, made by the clerks of the district courts in the several districts of Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas, in pursuance of the act of June twenty-seventh, eighteen hundred and sixty-four, chapter one hundred and sixty-five, from the records and journals transferred by them respectively, un-

der the said act, to the clerks of the circuit courts in said districts, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit courts, respectively, of transcripts of any of the books or papers so transferred to them, shall be received in evidence with the like effect as if made by the clerk of the court in which the proceedings were had. (Rev. Stats., sec. 897.)

§ 418. Transcribed records—North Carolina.—The transcripts into new books made by the clerks of the circuit and district courts for the western district of North Carolina, in pursuance of the act of June four, eighteen hundred and seventy-two, chapter two hundred and eighty-two, when certified by the clerks respectively making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said circuit and district courts, respectively, of transcripts of any of the said transcribed records, shall also be received in evidence with the like effect as if made by the proper clerk from the originals from which such records were transcribed. (Rev. Stats., sec. 898.)

§ 419. When original records are lost or destroyed.—When the record of any judg-

ment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had. (Rev. Stats., sec. 899.)

Note.—Secondary evidence of a judgment is admissible where the record is destroyed. (Cornett v. Williams, 20 Wall. 226.)

§ 420. Lost records.—When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect; that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested

therein, together with written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make and cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had if the same had not been lost or destroyed. (Rev. Stats., sec. 900.)

§ 421. Lost records of cause.—When any cause has been removed to the supreme court, and the original record thereof is afterward lost, a duly certified copy of the record remaining in said court may be filed in the court from which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed. (Rev. Stats., sec. 901.)

§ 422. In proceedings to restore lost or destroyed records—Notice.—In any proceedings in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or

destroyed, the notice required may be served on any non-resident of the district in which such court is held anywhere within the jurisdiction of the United States, or in any foreign country; the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal. (Rev. Stats., sec. 902; 20 U. S. Stats. 277.)

§ 423. Force and effect of papers restored or supplied.—A certified copy of the official return, or any other official paper of the United States attorney, marshal, or clerk, or other certifying or recording officer of any court of the United States, made in pursuance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return, paper, or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return, paper, or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in said court. And in all cases where any of the files, papers, or

records of any court of the United States have been or shall be lost or destroyed, the files, records, and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files, and papers, shall have the same force and effect, to all intents and purposes, as the originals thereof would have been entitled to. (Rev. Stats., sec. 903; 20 U. S. Stats. 277.)

§ 424. Compensation of clerks and attorneys.—That whenever any of the records or files in which the United States are interested of any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices, and other books and papers as said judge shall think proper. Said judges may direct the performance, by the clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation for services in the matter and for lawful disbursements as may be approved by the attorney-general of the United States, upon a

certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund. (Rev. Stats., sec. 904; 20 U. S. Stats. 277.)

§ 425. Authentication of legislative acts and proof of judicial proceedings of states, etc.—The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken. (Rev. Stats., sec. 905.)

Statutes.—An exemplification of a statute under the great seal of state may be given in evidence without further attestation, and the presumption is, that the officer who used the great seal is the person to whom it is confided. (U. S. v. Johns, 4 Dall. 415; S. C., 1 Wash. C. C. 363; U. S. v. Amedy, 11 Wheat. 392.) The statute book

of a state, purporting to be published by authority of its legislature, and deposited in the department of state, is evidence. (*Com. & F. Bank v. Patterson*, 2 Cranch C. C. 346.) So are the pamphlet laws of a state published by authority and proved to be admissible as evidence in the state. (*Rockville & W. T. Co. v. Andrews*, 2 Cranch C. C. 451; *Thompson v. Musser*, 1 Dall. 458.) But a printed pamphlet which has no seal affixed, containing the law of another state, is not admissible. (*Craig v. Brown*, *Peters C. C.* 354.)

Authentication of records.—A record must be authenticated according to the form used in the state whence it comes; and the only evidence of this fact is the certificate of the presiding judge (*Craig v. Brown*, *Peters C. C.* 354), whose official character should appear in the certificate (*Pratt v. King*, 1 Or. 49), stating that the attestation is in due form of law. (*Trigg v. Conway*, *Hemp.* 538.) A certificate by one styling himself "one of the judges" of a court is not sufficient. (*Stewart v. Gray*, *Hemp.* 94; *Gardner v. Lindo*, 1 Cranch C. C. 78.) The seal of the court must be annexed to the record itself; it is not enough that it is annexed to the judge's certificate. (*Turner v. Waddington*, 3 Wash. C. C. 126.) But the record of a court which has no seal may be admitted on such statement in the judge's certificate. (*Morgan v. Curtinius*, 4 McLean, 366.) If the record be duly certified under the act of 1790, no evidence is admissible that the attestation is not in due form. (*Ferguson v. Harwood*, 7 Cranch, 408.) If the record is properly proved, such proof is of the same nature as an inspection by the court of its own record, and shall have such faith and credit as it has in the state court from whence it was taken (*Mills v. Duryee*, 7 Cranch, 481; *Green v. Sarmiento*, 1 *Peters C. C.* 74; 3 Wash. 17; *McElmoyle v. Cohen*, 13 *Peters*, 312; *Whitaker v. Bramson*, 2 *Paine*, 209), and no greater. (*Public Works v. Columbia College*, 17 *Wall.* 521.)

Exemplified judgments.—The federal courts are bound to give to a judgment of a state court the same faith and credit to which it is entitled in the state courts. (*Chicago etc. R. R. Co. v. Wiggins' Ferry Co.*, 108 U. S.

18; Chase v. Curtis, 113 U. S. 452.) The act of May 26, 1790 (1 Stat. 122), now embodied in section 905 of the Revised Statutes, does not prevent an inquiry into the jurisdiction of the court, in which a judgment is rendered, to pronounce the judgment, nor into the right of the state to exercise authority over the parties or the subject-matter, nor whether the judgment is founded in and impeachable for a manifest fraud. (Cole v. Cunningham, 133 U. S. 107.) It did not make the judgments of the states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. They enjoy only the right of priority, or privilege, or lien, which the *lex fori* gives to them by its own laws, in their character of foreign judgments. (McElmoyle v. Cohen, 13 Pet. 312, 328, 329; D'Arcy v. Ketchum, 11 How. 165; Thompson v. Whitman, 18 Wall. 457; Pennoyer v. Neff, 95 U. S. 714; Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 292; Christmas v. Russell, 5 Wall. 290; Story on Constitution, secs. 1303 et seq., and Story on Conflict of Laws, sec. 609; Cole v. Cunningham, 133 U. S. 107.) A personal judgment is without validity if rendered by a state court in an action upon a money demand against a non-resident of the state. (D'Arcy v. Ketchum, 11 How. 165; Thompson v. Whitman, 18 Wall. 457; Hall v. Lanning, 91 U. S. 160; Pennoyer v. Neff, 95 U. S. 714; Guthrie v. Lowry, 84 Pa. St. 533; Scott v. Noble, 72 Pa. St. 115; Noble v. Thompson Oil Co., 79 Pa. St. 354; Steel v. Smith, 7 Watts & S. 447; Bank of U. S. v. Merchants' Bank, 7 Gill, 415; Clark v. Bryan, 16 Md. 171; Weaver v. Boggs, 38 Md. 255.)

Federal courts.—The words of the statute “in any other court within the United States” make its provisions applicable to the federal courts as well as to courts of other states (Mills v. Duryee, 7 Cranch, 481; Galpin v. Page, 3 Sawy. 93), and to the District of Columbia. (Mills v. Duryee, 7 Cranch, 481.) The transcript of a judgment of a state certified by the clerk is admissible in a federal court in the same state without any certificate from the judge (Mewster v. Spaulding, 6 McLean, 24); but it must be authenticated in accordance with this section to be used in a federal court sitting in another state (U. S. v. Bie-

busch, 1 Fed. Rep. 213); and the federal courts will give to the judgments of the state courts only the same faith and credit which the courts of other states are bound to give them. (*Pennoyer v. Neff*, 95 U. S. 714.)

Extraterritorial effect.—The act makes a judgment or decree evidence of the right established thereby, but gives it no extraterritorial effect. It is not a lien on lands in another state (*Green v. Sarmiento*, 1 Peters C. C. 74; S. C., 3 Wash. 17); does not operate as a conveyance of real estate in another state (*Watts v. Waddle*, 6 Peters, 389; S. C., 1 McLean, 200; *Tardy v. Morgan*, 3 McLean, 358); and cannot be enforced by execution in another state. (*McElmoyle v. Cohen*, 13 Peters, 312.) All courts of justice are bound to take judicial notice of the territorial extent of the governmental jurisdiction as appearing from public legislative acts. (*Jones v. United States*, 137 U. S. 202.) The provisions of the constitution (art. 4, sec. 1; Act of May 26, 1790, chap. 11; 1 Stats. at Large, 122; Rev. Stats., sec. 905) establish a rule of evidence, rather than of jurisdiction. Judgments recovered in one state of the Union, when proved in the courts of another government, whether state or national, differs from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud. (*Hanley v. Donoghue*, 116 U. S. 1; *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U. S. 265.)

Impeachment.—As to the impeachment in one state of a judgment rendered in another, see, on ground of negligence of attorney, *Amory v. Amory*, 3 Biss. 266; counter-claim, *Barras v. Bidwell*, 3 Woods, 5; limitations, *Christmas v. Russell*, 5 Wall. 290; *Bank v. Dalton*, 9 How. 522; *Bacon v. Howard*, 20 How. 22; jurisdiction, *Christmas v. Russell*, 5 Wall. 290; *Knowles v. Gaslight & C. Co.*, 19 Wall. 58; S. C., 1 Dill. 421; *Cheever v. Wilson*, 9 Wall. 108; non-residence, *Kuhn v. McMillan*, 3 Dill. 372; plea of *nul tie*, *Hill v. Mendenhall*, 21 Wall. 453; service by publication, *Galpin v. Page*, 18 Wall. 350; S. C., 3 Sawy. 93; *Public Works v. Columbia College*, 17 Wall. 521; *Nations v. Johnson*, 24 How. 195; *Phelps v. Holker*, 1 Dall. 261; service on agent, *Warren Manf. Co. v. Etna Ins.*

Co., 2 Paine, 501; *Lafayette Ins. Co. v. French*, 18 How. 404; S. C., 5 McLean, 461; service on one of several partners, *Hall v. Lanning*, 91 U. S. 160; *Burt v. Delano*, 4 Cliff. 611; fraud, *Maxwell v. Stewart*, 22 Wall. 77; *Randolph v. King*, 2 Bond, 104; attachment, *Maxwell v. Stewart*, 22 Wall. 7; *Green v. Van Buskirk*, 7 Wall. 139; S. C., 2 Keyes, 119; 34 Barb. 457; *Warburton v. Aken*, 1 McLean, 460.

§ 426. Proofs of records, etc., kept in offices not pertaining to courts.—All records and exemplifications of books, which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal of the state or territory or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal

of the state, territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the state, territory, or country, as aforesaid, from which they are taken. (Rev. Stats., sec. 906.)

Proofs of records.—A copy of the record of proceedings of a court is not within this section (*Tarlton v. Briscoe*, 1 A. K. Marsh. 67); as a copy of a judgment of a justice of the peace. (*Lawrence v. Gaultney*, Cheves, 7; *Snyder v. Wise*, 10 Pa. 157.) A copy of a deed recorded in one state is not admissible in a court of another state without proof that the laws of the other state authorize the record of the instrument. (*Powell v. Knox*, 16 Ala. 364.) So if certified by the clerk of the court where recorded with the certificate of the governor, it is not admissible. (*Leggou v. Canal Co.*, 3 La. Ann. 138; *Dickson v. Grissom*, 4 La. Ann. 538; *Condit v. Blackwell*, 19 N. J. Eq. 193; *Quay v. Eagle F. Ins. Co.*, Anth. 173.) The statute does not extend to the exemplification of the record of a deed or other private writing returned to the owner after record. (*Russell v. Kearney*, 27 Ga. 96.) So a copy of a power of attorney recorded in one state is not evidence to affect land situated in another state. (*State v. Eagle*, 21 N. J. 347.) So a copy of a will proved and recorded in one state is not competent evidence in another state. (*Hylton v. Brown*, 1 Wash. C. C. 298; *Kelly v. Ross*, Busb. 277.) When the record of a will does not appertain to a court, it should be authenticated in conformity with this section. (*Ewing v. Savory*, 4 Bibb, 424.) So the record of a patent for an office when it does not appertain to a court should be authenticated (*Henthorn v. Shepherd*, 1 Blatchf. 157); but an exemplified copy of a marriage license and certificate duly authenticated is competent evidence. (*King v. Dale*, 2 Ill. 513.) Unless a guardian's bond is a matter of rec-

ord, it should be certified under this section. (*Carlisle v. Tuttle*, 20 Ala. 613.) A record may be proved by a sworn copy. (*Karr v. Jackson*, 28 Mo. 316.)

Certificate.—The mode prescribed in this section is the only mode of authentication, as of a deed (*Pennel v. Weyant*, 2 Har. (Del.) 501); and the copy thereof is not admissible in another state unless the attestation is in due form. (*Drummond v. Magruder*, 9 Cranch, 122; *Key v. Vaughn*, 15 Ala. 497; *Johnson v. Fowler*, 4 Bibb, 521; *Pennel v. Weyant*, 2 Har. (Del.) 501; *Warren v. Wade*, 7 Jones (N. C.) 494; *Petermans v. Laws*, 6 Leigh, 523; *Kidd v. Manley*, 23 Miss. 156; *Brown v. Edson*, 23 Vt. 435.) If a certificate of incorporation is filed in the office of the secretary of state, he need not certify that the attestation is in due form. (*Grant v. H. C. Coal Co.*, 80 Pa. St. 208.) A pardon certified under the great seal of the state is competent evidence. (*U. S. v. Wilson*, Bald. 78.) So a copy of a survey certified by the register and by the judge and by the secretary of state under the great seal is sufficient (*Smith v. Redden*, 5 Har. (Del.) 321); but a copy of a will and probate attested by the register with the seal of his office is not sufficient. (*Ewing v. Savory*, 4 Bibb, 424; *Smith v. Redden*, 5 Har. (Del.) 321.) The clerk's certificate should show that the judge is presiding judge, or that he is presiding judge for the district. (*Paca v. Dutton*, 4 Mo. 371.)

§ 427. Copies of foreign records, etc.

—Land titles.—It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the departments, the solicitor of the treasury, or the commissioner of the general land-office to authenticate copies thereof under

his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence, or other public documents, respectively; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the solicitor of the treasury, who shall file them in his office, and cause them to be recorded in a book to be kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence, or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed by or under the United States may come into question, equally with the originals. (Rev. Stats., sec. 907.)

§ 428. Little & Brown's edition of the statutes.—The edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several states, without any further proof or authentication thereof. (Rev. Stats., sec. 908.)

§ 429. Printed copies of statutes to be evidence.—That the said printed copies of the

said acts of each session and of the said bound copies of the acts of each Congress shall be legal evidence of the laws and treaties therein contained, in all the courts of the United States and of the several states therein. (18 U. S. Stats. 114.)

§ 430. Revised Statutes of U. S.—The publication herein authorized shall be taken to be *prima facie* evidence of the laws therein contained in all the courts of the United States, and of the several states and territories therein; but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress; *provided*, that nothing herein contained shall be construed to change or alter any existing law. (21 U. S. Stats., sec. 380.)

§ 431. Burden of proof when it lies on claimant in seizure cases.—In suits or informations brought, where any seizure is made pursuant to any act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant; *provided*, that probable cause is shown for such prosecution, to be judged of by the court. (Rev. Stats., sec. 909.)

Note.—See *United States v. 740 Tins of Opium*, (D. C. Wash.) 44 Fed. Rep. 798; *United States v. 1060 Tons of Opium*, (D. C. D. Wash.) Id. 799.

"Probable cause" does not mean *prima facie* evidence, but less than evidence which would justify condemnation. (*Locker v. U. S.*, 7 Cranch, 339; *The Luminary*, 8 Wheat. 407; *Woods v. U. S.*, 16 Peters, 342; *The John Griffin*, 15 Wall. 29.) Whether probable cause has been shown is a question of law. (*Taylor v. U. S.*, 3 How. 197; *Buckley v. U. S.*, 4 How. 251; *Clifton v. U. S.*, 4 How. 242.) If defendant withholds evidence in his possession, it may be presumed that such evidence is unfavorable to him. (*Clifton v. U. S.*, 4 How. 242) This section applies to seizures under laws enacted since its adoption. (*Cliquot's Champagne*, 3 Wall. 114.)

§ 432. Possessory actions for recovery of mining titles.—No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession. (Rev. Stats., sec. 910.)

§ 432 a. Supplement of Revised Statutes as evidence.—The publication of the Supplement of the Revised Statutes, to include the general laws of the forty-seventh, forty-eighth, forty-ninth, fiftieth, and fifty-first Congresses, and their printing and distribution herein authorized, shall be taken to be *prima facie* evidence of the laws therein contained, but shall not change nor alter any existing law, nor preclude reference to nor control in case of any discrepancy, the effect of an original act passed by Congress. (26 U. S. Stats. 50.)

CHAPTER XX.

PROCEDURE.

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§ 433. Sealing and testing of writs.—

All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the supreme court or a circuit court shall bear teste of the chief justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof. The seals of the said courts shall be provided at the expense of the United States. (Rev. Stats., sec. 911.)

Note.—The provisions of this section are not abrogated by section nine hundred and fourteen. (Dwight v. Merritt, 18 Blatchf. 305; see Whalen v. Sheridan, 18 Blatchf. 324.) A writ of error bearing the teste of the clerk, and not of the chief justice of the supreme court, is void. (Wells v. McGregor, 13 Wall. 188.) A summons or notice must be under the seal of the court, and signed by the clerk. (Dwight v. Merritt, 4 Fed. Rep. 614; Peaslee v. Haberstro, 15 Blatchf. 472.) A warrant in admiralty not under seal nor signed by the clerk is not sufficient, although signed by the judge. (Bowler v. Eldridge, 18 Conn. 1.) And if void on its face, it is no protection to the marshal. (Bowler v. Eldridge, 18 Conn. 1.) If a writ of *renditioni exponas* is regular in all respects, except that it is signed by a deputy clerk in his own name, it is an irregularity that can be taken advantage of only in a direct proceeding. (Griswold v. Connolly, 1 Woods, 193; Bragg v. Lorio, 1 Woods, 209.) The provisions of this section are held obligatory on parties and courts (Thompson v. Railroad Companies, 6 Wall. 134), but they do not apply to the territories. (Hornbuckle v. Toombs, 18 Wall. 648.) A garnishee summons is process within this section, and must be issued by the clerk. (Middleton Paper Co. v. Rock Riv. P. Co., 19 Fed. Rep. 252.) A paper purporting to be a *venire facias* tested in the name of the deputy clerk is void. (United States v. Antz, 16 Fed. Rep. 119.)

§ 434. Teste of process, day of.—All process issued from the courts of the United States shall bear teste from the day of such issue. (Rev. Stats., sec. 912; 17 U. S. Stats. 197.)

Note.—A writ of error is within this rule. (Atherton v. Fowler, 91 U. S. 143.)

§ 435. Mesne process.—The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty

and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the supreme court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States. (Rev. Stats., sec. 913.)

Practice in equity.—The forms and modes of procedure in equity are according to the principles, rules, and usages of the court of chancery in England. (*Vattier v. Hinde*, 7 Pet. 253; *Livingston v. Story*, 9 Pet. 632; *Van Hook v. Pendleton*, 2 Blatchf. 85; *Hubbard v. Turner*, 2 McLean, 519; *Goodyear v. P. R. Co.*, 2 Cliff. 351; *Motte v. Bennett*, 2 Fish. Pat. Cas. 642.) The remedies at common law and equity are distinguished, and jurisdiction in equity is to be uniform throughout the United States, without modification from state legislation or practice. (*United States v. Howland*, 4 Wheat. 108; *Livingston v. Story*, 9 Pet. 632; *Green v. Creighton*, 23 How. 90; *Pomerooy v. Manin*, 2 Paine, 476; *Farmers' L. & T. Co. v. Central R. R. Co.*, 2 Fed. Rep. 656.) So state laws affecting remedies have no effect upon the jurisdiction. (*Mayer v. Foulkrod*, 4 Wash. C. C. 349.) So as to the effect of granting an injunction (*Boyle v. Zacharie*, 6 Pet. 648); and if a bond with sureties be required on granting an injunction, the court cannot give judgment against the obligors on dissolution of the injunction, although it is the practice in the state courts. (*Bein v. Heath*, 12 How. 168; *Deakin v. Stanton*, 3 Fed. Rep. 435.) State laws providing against foreclosing a mortgage where judgment has been obtained on the debt do not apply (*Dow v. Chamberlain*, 5 McLean, 281); nor can the circuit court

enter a decree for the balance, after exhausting the proceeds of the mortgaged estate. (*Noonan v. Lee*, 2 Black, 500.) In a bill to quiet title defendant cannot set up a claim for the property and rents. (*Hurst v. Hollingsworth*, 100 U. S. 100.) If an undertaking is filed to release property from a lien, a decree cannot be made at once against the undertakers on a decree entered against the principal without an express stipulation (*Phillips v. Gilbert*, 101 U. S. 721); and parties may recede from a stipulation waiving a separate trial of legal and equitable rights. (*Hurst v. Hollingsworth*, 100 U. S. 100.) Although under the state law interrogatories may be propounded by defendant, yet the practice does not prevail in the federal courts. (*McDonald v. Smalley*, 1 Pet. 620.) So of the granting of a new trial instead of a rehearing is erroneous. (*U. S. v. Curry*, 6 How. 106.) The practice of the court of chancery in England, and not that of the court of exchequer, furnishes the basis of equity practice in United States courts. (*Smith v. Burnham*, 2 Sum. 612.) So circuit courts have power to appoint masters in chancery (*Van Hook v. Pendleton*, 2 Blatchf. 85); or examiners in chancery (*Van Hook v. Pendleton*, 2 Blatchf. 85); or commissioners to take testimony. (*Van Hook v. Peddleton*, 2 Blatchf. 85.) The facts stated as affording grounds for relief must be stated according to their legal effect. (*John Hancock Mut. L. Ins. Co. v. Manning*, 9 Fed. Rep. 298; *Johnson v. Roe*, 1 Fed. Rep. 695.) Equity practice in the courts of the United States is regulated by the laws of Congress, and the rules of the United States supreme court made under the authority of an act of Congress. (*Gaines v. New Orleans*, Cir. Ct. La., 27 Fed. Rep. 411; *United States v. Wilson*, 118 U. S. 86. And see *United States v. Am. Bell Telephone Co.*, 29 Fed. Rep. 17; *Phelps v. Elliott*, 26 Fed. Rep. 881; *Nickerson v. Atchison etc. R. R. Co.*, 30 Fed. Rep. 85; *Wells etc. Co. v. Miner*, 25 Fed. Rep. 533.)

In admiralty.—The admiralty practice is grafted on the practice in Great Britain, and if a change has taken place the practice of this country takes the precedence. (*Manro v. The Almeida*, 10 Wheat. 473; *The Delaware*, Olcott, 240.) A district court cannot require stipulators

against whom a decree is rendered to appear, to appear in in supplementary proceedings. (The Blanche Page, 16 Blatchf. 1.) The union of equitable and legal causes of action in one suit is forbidden. (Hurst v. Hollingsworth, 100 U. S. 100. See, generally, Ex parte Phoenix Ins. Co., 118 U. S. 610.)

§ 436. Other than equity and admiralty causes.—The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding. (Rev. Stats., sec. 914.)

Section construed.—By section 914 of the United States Revised Statutes the practice, pleadings, and forms and modes of proceeding in federal courts are required to conform "as near as may be" to those existing at the time in like causes in the courts of record of the states in which cases are heard. (Robertson v. Perkins, 129 U. S. 233; Whalen v. Sheridan, 10 Fed. Rep. 662; 18 Blatchf. 324; Robinson v. Mut. Ben. L. Ins. Co., 16 Blatchf. 201; United States v. Brawner, 7 Fed. Rep. 90; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Perry v. Mechanics' Mut. Ins. Co., 11 Fed. Rep. 478.) This applies to the provision in the state statute that allegations of the complaint not denied in the answer must be taken as true. (Robertson v. Perkins, *supra*.) Where procedure is regulated by a statutory code it governs the practice in courts of the United States sitting therein in common-law cases by virtue of this section. (United States v. Parker, 120 U. S. 89.) So pleadings and practice in an action on the common-law side of the federal circuit court are governed by state law. (Henderson v. Louisville & N. R. Co., 123

U. S. 61; Gamewell Fire Alarm Tel. Co. v. New York, 31 Fed. Rep. 312; Bond v. Dustin, 112 U. S. 604; Glenn v. Sumner, 132 U. S. 152.) As to the sufficiency and scope of pleadings, and the form and effect of verdicts in actions at law, the circuit courts of the United States are governed by the practice of the courts of the state in which they are held. (Glenn v. Sumner, 132 U. S. 152.) The object of the section was to assimilate the form and manner in which the parties should present their claims and defense in the preparation for the trial of suits in the federal courts, to those prevailing in the state courts. (Ex parte Chateaugay Ore & Iron Co., 128 U. S. 544; Lamaster v. Keeler, 123 U. S. 376.) This section must be construed in connection with Rev. Stats. sec. 918. (Osborn v. Detroit, 28 Fed. Rep. 385.) The indefiniteness of the expression "as near as may be" gives power to the judge to reject any subordinate provision which, in his judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice. (Gould & T. notes to U. S. Rev. Stat. 285, citing Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 301; Hat-Sweat Mfg. Co. v. Davis Sewing Mach. Co., 31 Fed. Rep. 296; Lowry v. Story, Id. 769.)

In general.—United States courts conform as near as may be to the practice, pleading, and modes of procedure in civil cases, other than equity or admiralty, with the rules of practice of the states where they are held. (Perry v. Mechanics' Mut. Ins. Co., 11 Fed. Rep. 478.) This section only assimilates the practice as near as may be. (Whalen v. Sheridan, 10 Fed. Rep. 662; 18 Blatchf. 324; Robinson v. Mut. Ben. Ins. Co., 16 Blatchf. 201; U. S. v. Brawner, 7 Fed. Rep. 90; see Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291.) It adopts only statutory procedure, and does not include constructions placed upon common-law remedies by state courts (Sanford v. Portsmouth, 6 Cent. L. J. 146), nor does it apply to cases where Congress has legislated. (Easton v. Hodges, 7 Biss. 324.) In such case the practice is exclusive, and courts have no power to authorize another mode. (Parsons v. Bedford, 3 Peters, 433; Teese v. Phelps, McAll. 17.) The practice and procedure of the state courts is adopted in absence of congressional legislation on the subject (Wear v. Mayer,

6 Fed. Rep. 660; 2 McCrary, 172), and it can go no further than adopt the whole state statute as near as may be. (U. S. v. Brawner, 7 Fed. Rep. 90.) Where Congress, by statute, points out a specific course of procedure, or legislates generally on the subject-matter, such legislation must be followed. (McNutt v. Bland, 2 How. 17; U. S. v. Pings, 1 Fed. Rep. 715; Dwight v. Merritt, 4 Fed. Rep. 616; 18 Blatchf. 305; citing Easton v. Hodges, 7 Biss. 324; Beardsley v. Littell, 14 Blatchf. 102; U. S. v. Hutton, 25 Int. Rev. Rec. 57.) This section does not apply to a rule of practice of a state court adopted subsequently to an act of Congress regulating the practice in federal courts. (Wilcog v. Hunt, 13 Peters, 378.) It does not by implication repeal any previous act of Congress expressly providing a particular mode of proceeding. (Wear v. Mayer, 6 Fed. Rep. 660; 2 McCrary, 172.) This section relates to practice and procedure in suits against parties prosecuted in federal courts, but does not extend it over persons and causes not before within the cognizance of the federal court. (Bath Co. v. Amy, 13 Wall. 244; Main v. Second Nat. Bank, 6 Biss. 25.) Congress did not enlarge the jurisdiction of federal courts by adopting the state practice so as to extend it over persons not within the jurisdiction. (Toland v. Sprague, 12 Peters, 300; Main v. Second Nat. Bank, 6 Biss. 26; Picquet v. Swan, 5 Mason, 35.) The intention of the statute is to secure in each state one method of procedure in all common-law cases by adopting in general the procedure of the state courts. (Bills v. N. O. St. L. & R. Co., 3 Blatchf. 228.) The statute makes a distinction between common-law cases and equity and admiralty cases as to forms and modes of procedure (Steam Stone Cutter Co. v. Sears, 9 Fed. Rep. 9; 20 Blatchf. 23; Sanford v. Portsmouth, 6 Cent. L. J. 147; Nudd v. Burrows, 91 U. S. 420), and applies solely to common-law suits (The Blanche Page, 10 Blatchf. 5), and has no application to equity suits. (Blease v. Garlington, 92 U. S. 1; Brooks v. Vermont C. R. Co, 14 Blatchf. 471; Taylor v. Holmes, 14 Fed. Rep. 498; Martindale v. Waas, 11 Fed. Rep. 557; 3 McCrary, 637; see Butler v. Young, 5 Chic. L. N. 146.) So the practice of allowing ejectments to be maintained on equitable titles cannot affect the jurisdiction of the courts of the United States (Fenn v. Holme, 21 How. 481;

Hooper v. Scneimer, 23 How. 249; Sheirburn v. Cordova, 24 How. 423; Robinson v. Campbell, 3 Wheat. 212); and so of answers to an action at common-law, claiming an equitable right. (Dwight v. Merritt, 18 Blatchf. 305; Republic Ins. Co. v. William, 3 Biss. 37; see Morgan v. Eggers, 127 U. S. 63.)

Procedure.—The federal courts will follow the form of action of a state court (Taylor v. Brigham, 3 Woods, 377); and may conform to the practice of the state courts in the recovery of a penalty if no other remedy is given. (U. S. v. Elliott, 25 Int. Rev. Rec. 319.) The practice of allowing one suit on a bond against the executor of a deceased obligor together with the surviving obligor may be followed. (U. S. v. Tracy, 8 Ben. 1; U. S. v. Lawrence, 14 Blatchf. 229.) So a state law which permits a joint action against the maker and indorser may be followed in the federal courts (Fullerton v. Bank, 1 Pet. 604); and an action of replevin may be sustained when the state law permits it. (Gibbs v. Usher, 1 Holmes, 348.) When pending cases are proceedings at law they are entitled to the benefits of the provisions of this section (Moran v. City of Elizabeth, 9 Fed. Rep. 73), and the first inquiry is, what is the practice in the state courts (Brown v. Phila. & C. Co., 4 Fed. Rep. 185); but a party who has a mere equitable title cannot maintain an action at law (Bennett v. Bitterworth, 11 How. 669; Penn v. Klyne, Peters C. C. 497, note; Jones v. McMaster, 20 How. 9; Green v. Mezes, 24 How. 268; U. S. v. Cox, 7 How. 833; Robinson v. Campbell, 3 Wheat. 212); nor does this section adopt the state law allowing equitable defenses in a legal action. (Montejo v. Owen, 14 Blatchf. 324; La Mothe Manuf. Co. v. Nat. Tube Works, 15 Blatchf. 432.) Where a state abolishes fictitious proceedings and establishes in their place the action of trespass, for the purpose of trying the title to lands and recovery of their possession, this section applies. (Sears v. Eastburn, 10 How. 187.) This section applies to *mandamus* as a remedy to compel municipal corporations to levy a tax to pay a judgment creditor. (U. S. v. City of Keokuk, 6 Wall. 514; see Wisdom v. Memphis, 8 Cent. L. J. 108.) Practice in *mandamus* proceedings when ancillary are not af-

fectured by this section (U. S. v. Union Pac. R. R. Co., 2 Dill. 527); otherwise they are governed by the state law. (Moran v. City of Elizabeth, 9 Fed. Rep. 72.) A proceeding to restore a lost record is *sui generis*, and is governed by act of Congress. (Turner v. Newman, 3 Biss. 307.)

What not embraced within this section.—Questions of power and authority of the court are not embraced within this section. (Lyons v. Lyons Nat. Bank, 8 Fed. Rep. 373.) This section does not apply to matters which are regulated exclusively by acts of Congress, or, when Congress is silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the courts of the United States. (Ex parte Chateaugay Ore & Iron Co., 128 U. S. 544; Whalen v. Sheridan, 18 Blatchf. 324; United States v. Train, 12 Fed. Rep. 852; Lamaster v. Keeler, 123 U. S. 376; Easton v. Hodges, 7 Biss. 324; McNutt v. Bland, 2 How. 17; United States v. Pings, 4 Fed. Rep. 715; Dwight v. Merritt, Id. 616; Beardsley v. Littell, 14 Blatchf. 102; United States v. Hutton, 25 Int. Rev. Rec. 57.) The personal conduct and administration of the judge, in the discharge of his separate functions, is not practice or pleading, or a form or mode of proceeding within the meaning of the terms of this section. (Ex parte Chateaugay Ore & Iron Co., 128 U. S. 544; Nudd v. Burrows, 91 U. S. 426.) The provision in a state statute prescribing that the judge shall require the jury to answer special interrogatories, in addition to finding a general verdict, does not apply to courts of the United States under this section. (Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Newcomb v. Wood, 97 U. S. 581.) This section does not extend to the means of enforcing or revising a decision once made by the circuit court, nor does it extend to proceedings to enforce a judgment which is provided for by section 916. (Ex parte Chateaugay Ore & Iron Co., 128 U. S. 544; Lamaster v. Keeler, 123 U. S. 376.)

Joinder of parties.—When the state allows an intervention the same practice may be followed. (Bank v. Labitat, 1 Woods, 11; Featherman v. La. State Seminary, 2 Woods, 71.) A provision as to when an administrator

may apply to be made a party is adopted under this section. (*Barker v. Ladd*, 3 Sawy. 44.) If all parties liable on a bond may be joined in the state court, they may be joined in the federal court (U. S. v. *Tracy*, 8 Ben. 1); and although a bond is made to an agent, the principal may sue in his own name if the state law allows it. (*Weed Sew. Mach. Co. v. Weeks*, 3 Dill. 261.) Where the state law makes an oral transfer by the insured after loss of his right of action on the policy valid, the assignee may sue. (*Bennett v. Maryland & F. Ins. Co.*, 17 Alb. L. J. 363.) Where the state law provides that no action will be defeated on account of misjoinder of parties, the federal court will conform to the rule. (*Perry v. Mech. Mut. Ins. Co.*, 11 Fed. Rep. 482.)

Rules of pleading.—This section applies to the rules of pleading (*Oscanyan v. Winchester Arms Co.*, 15 Blatchf. 87; *Taylor v. Brigham*, 3 Woods, 377; *Lewis v. Gould*, 13 Blatchf. 216), and to the time of filing the declaration after being returned summoned (*Record v. New Providence*, 5 Fed. Rep. 434); but not to the signature to a bill. (*Stinson v. Hildrop*, 8 Biss. 376.) It applies to the mode of amending the complaint as of course (*Rosenbach v. Dreyfuss*, 1 Fed. Rep. 393; *West v. Smith*, 101 U. S. 263), as by striking out a plaintiff or adding a plaintiff. (*Whitaker, v. Pope*, 2 Woods, 463.) Pleadings not authorized in the state court in a like suit will be set aside on motion. (*Lewis v. Gould*, 13 Blatchf. 216.) On removal of a cause no other or different pleadings are necessary. (*Merch. & Manuf. Bk. v. Wheeler*, 13 Blatchf. 218.) This section does not apply to the rule of set-off, which is exclusively under the laws of the United States. (U. S. v. *Robeson*, 9 Peters, 319.) If the state law allows a party to take advantage of the statute of limitations by demurrer, he may do so in the federal courts. (*Chemung Canal Bk. v. Lowrey*, 93 U. S. 72.) In common-law actions, the sufficiency of the pleadings is to be determined by the state code of procedure. (*Castro v. De Uriarte*, 12 Fed. Rep. 251.) So of the sufficiency of a plea. (U. S. v. *Tilton*, 7 Ben. 306.) Provisions as to pleadings in the United States courts, found in U. S. Rev. Stat., sec. 4920, which was passed in 1874, must control the general provisions of sec-

tion 914, passed in 1872. (*Myers v. Cunningham*, 54 Off. Gaz. 1417; 44 Fed. Rep. 346.)

Practice.—It applies to the requirement to answer interrogatories as a substitute for a bill of discovery (*Bryant v. Leyland*, 7 Fed. Rep. 126), and to ordering a proceeding to substitute one defendant for another (*Harris v. Hess*, 10 Fed. Rep. 263; 20 Blatchf. 253), and to all motions at common law required by the practice at a special term of the state court, in a stated term of the federal court (*Emma S. M. Co. v. Park*, 14 Blatchf. 411; *Nasro v. Crogin*, 3 Dill. 474; *Republic Ins. Co. v. Williams*, 3 Biss. 370), but it does not apply to ordering a peremptory nonsuit against the will of the plaintiff. (*Elmore v. Grymes*, 1 Peters, 471.) It applies to notice of hearing for the trial of an issue of law on a demurrer (*Rosenbach v. Dreyfuss*, 2 Fed. Rep. 23); but a state law regulating the filing of a *lis pendens* does not apply to federal courts. (*Majors v. Cowell*, 51 Cal. 478; see *U. S. v. Stevenson*, 1 Abb. C. C. 495.) A state law authorizing dismissal of a suit, and which prohibits reinstatement unless at the next term, is not covered by this section. (*Mutual Build. Fund v. Bossieux*, 1 Hughes, 386.) There is no authority to refer an action to referees without consent of parties, although the state court may. (*Howe Mach. Co. v. Edwards*, 15 Blatchf. 402.) This section has no reference to the designation of jurors. (*U. S. v. Collins*, 1 Woods, 499.) A state law as to instructions to the jury has no application to federal courts. (*Indianapolis & St. Louis R. R. Co. v. Horst*, 93 U. S. 291; *Hawkin v. Squires*, 5 Biss. 186.) Questions of power and authority of the court are not embraced within this section. (*Town of Lyons v. Lyons Nat. Bk.*, 8 Fed. Rep. 373; 19 Blatchf. 279.) This section was not intended to fetter the judge in the personal discharge of his accustomed duties, or to trench upon the common-law powers with which he is clothed. (*U. S. Mut. Acc. Asso. v. Barry*, 131 U. S. 100.) A federal court is not required to submit a special verdict as provided by the rules of practice in the state (*U. S. Mut. Acc. Asso. v. Barry*, 131 U. S. 100); and state constitution cannot, any more than a state statute, prohibit judges of the court of the United States from charging juries with regard to matters of fact.

(*St. Louis I. M. & S. R. Co. v. Vickers*, 122 U. S. 360.) So remedies in the United States courts are at common law or in equity, and are uncontrolled in that particular by the practice of the state courts. (*New Orleans v. Louisiana Construction Co.*, 129 U. S. 45.) Although the forms of proceeding and practice in the state courts have been, as near as may be, adopted in the circuit and district courts of the United States, yet this must not be understood as authorizing an equitable defense to an action at law, or the blending of legal and equitable claims in one suit (*Doe v. Roe*, 31 Fed. Rep. 97; *Herklotz v. Chase*, 32 Fed. Rep. 433); but such defense must be enforced by a bill in equity to stay the suit at law. (*Wood v. Consolidated Electric Light Co.*, 36 Fed. Rep. 538.) Equity suits in the federal courts are regulated, not by a state statute, but by the judiciary acts and the rules of equity practice adopted for and governing said courts. (*United States v. American Bell Teleph. Co.*, 29 Fed. Rep. 17.) Courts of the United States are not governed by the statute or practice of the state courts as to motions for new trial and bills of exceptions. (*Fishburn v. Chicago, M. & St. P. R. Co.*, 137 U. S. 60.) The Revised Statutes, sections 914, 915, authorizing the practice and procedure in federal courts to conform to those of the respective states, do not give a United States circuit court sitting in Connecticut jurisdiction of proceedings *in rem* against the property of a non-resident defendant, who has not been personally served or appeared. (*Harland v. U. S. Tel. Co.*, 40 Fed. Rep. 308.)

Rules of evidence.—This section does not extend to rules of evidence (*Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457; *Beardsley v. Littell*, 14 Blatchf. 102); as state provision for examination of a witness before trial. (*Beardsley v. Littell*, 14 Blatchf. 102.) Such examination of a party before trial is allowed only when depositions before trial are authorized by the Revised Statutes. (*Easton v. Hodges*, 7 Biss. 324; *Corbett v. Gibson*, 16 Blatchf. 336.) If the state law gives the right to a party to require testimony to be taken in writing, this practice must prevail. (*Parsons v. Bedford*, 3 Pet. 433.) The practice in taking depositions is regulated by this section (*Sage v.*

Tauszky, 6 Cent. L. J. 7); but not to depositions *de bene esse* (U. S. v. Tilden, 25 Int. Rev. Rec. 352); nor to the mode of executing the commission (U. S. v. Pings, 4 Fed. Rep. 714); nor does it govern the production of books and writings. (Easton v. Hodges, 7 Biss. 324.) Where matter, as the production of books and documents, is expressly regulated by Congress, it is not a matter in which by this section the practice of the state courts is adopted. (U. S. v. Hutton, 10 Ben. 269. See generally Vance v. Campbell, 1 Black, 427; McNeil v. Holbrook, 12 Pet. 84; Thompson v. Central Ohio R. R. Co., 6 Wall. 134.) State rules are always followed in commercial cases. (Wright v. Bales, 2 Black, 535.) But it is only in cases not provided for in the statutes of the United States that the laws of the state in which the court is sitting prevail. (King v. Worthington, 104 U. S. 44; Potter v. Third Nat. Bank of Chicago, 102 U. S. 163; Ex parte Fisk, 113 U. S. 713.)

Judgments and decrees.—A judgment may be entered according to the facts alleged and proved, without regard to the form of pleading, if it is the practice under the state law. (Whalen v. Sheridan, 10 Fed. Rep. 661; 18 Blatchf. 324.) A judgment may be entered against one of several defendants, if the state law permits it. (Sawin v. Kenny, 93 U. S. 289.) A judgment may be entered against sureties on a *supersedeas* bond after a return of *nulla bona*, if the state law permits it. (Hiriart v. Ballou, 9 Pet. 156; Smith v. Gaines, 93 U. S. 341.) So if the state law permits judgment against a marshal on motion for money not paid over (Gwin v. Breedlove, 2 How. 29); but it cannot enforce against a marshal a penalty allowed by a state law for omitting to pay over money collected on execution. (Gwin v. Breedlove, 2 How. 29.) It is irregular to enter judgment on a referee's report without an application to the court, that being the practice in the state court. (Fourth Nat. Bank v. Neghart, 13 Blatchf. 393.) Judgments and decrees are liens when made so by state statutes. (Ward v. Chamberlain, 2 Black, 430.) A state law requiring a judge to give his decision in writing is not binding on the federal courts. (Martindale v. Wass, 11 Fed. Rep. 551; 3 McCrary, 637.) If an order against a garnishee is not a judgment under state law, it is not in

the federal courts. (*Atlantic & Pac. R. Co. v. Hopkins*, 94 U. S. 11.)

Writs of error and review.—This section does not extend to enforcing or revising decisions once made. (*U. S. v. Train*, 12 Fed. Rep. 853.) The rules of state practice have no application over courts of error or bills of exceptions. (*Whalen v. Sheridan*, 18 Blatchf. 308; *S. C.* 5 Fed. Rep. 136; *Marye v. Strouse*, 5 Fed. Rep. 49; see *Miller v. Ehlers*, 91 U. S. 251.) And the state law allowing a second trial is not applicable. (*Newcomb v. Wood*, 97 U. S. 581; *Cady v. Phoenix F. Ins. Co.*, 18 Int. Rev. Rec. 30.) It is doubtful whether cases tried in the circuit court by a referee, in states where such a practice exists, can be reviewed in the supreme court. (*Boogher v. Life Ins. Co.*, 103 U. S. 90; see *Bridges v. Sheldon*, 18 Blatchf. 295; *Robinson v. Mut. Ben. L. Ins. Co.*, 16 Blatchf. 194.) There is nothing in this section which extends to or affects the power of federal courts, heretofore existing on a writ of error. (*Town of Lyons v. Lyons Nat. Bank*, 8 Fed. Rep. 369; 19 Blatchf. 279; *Whalen v. Sheridan*, 18 Blatchf. 308. See *Baker v. Power*, 124 U. S. 167.)

Forms of state process.—The forms of process for commencement of suits conform to the state process under this section, except as to the signature of the attorney, which is provided for by act of Congress, section 911, Revised Statutes. (*Brown v. Pond*, 5 Fed. Rep. 37; see *Ricard v. New Providence*, 5 Fed. Rep. 434.) But it does not authorize commencement of an action by summons in the name of plaintiff's attorney, although authorized by state laws. (*Martin v. Criscuola*, 10 Blatchf. 211.) It adopts the effect as well as the form of the state process. (*Bank of U. S. v. Halstead*, 10 Wheat. 51.) Under this section old forms of process for the commencement of common-law actions have been superseded by summons, except as to the mode of attestation, which is provided for by Revised Statutes, section 911 (*Brown v. Pond*, 5 Fed. Rep. 37; *Peaslee v. Haberstro*, 15 Blatchf. 472; *Dwight v. Merritt*, 18 Blatchf. 305; 4 Fed. Rep. 614), which section is not inconsistent with or repealed by this section. (*Dwight v. Merritt*, 18 Blatchf. 306; *Peaslee v. Haber-*

stro, 15 Blatchf. 472.) Attachment process and procedure are adopted by this section. (Steam Stone Co. v. Sears, 9 Fed. Rep. 49.) It applies to process by which suits are brought, and its mode of service (Brownell v. Troy & Bost. R. Co., 18 Blatchf. 245; Dwight v. Merritt, 18 Blatchf. 305; Springer v. Foster, 2 Story, 383; Perkins v. Watertown, 5 Biss. 320), and to a writ of *scire facias* in reciting a judgment on a prior *scire facias*. (Brown v. Chesapeake etc. C. Co., 4 Fed. Rep. 771.) Where state laws allow a subpoena to be served by a private person, such service is good in the federal court. (Cummings v. Akron C. & P. Co., 6 Blatchf. 509; Schwabacker v. Reilly, 2 Dill. 127.) Process may be served by the marshal or his deputy, notwithstanding the state law as to a private person. (Schwabacker v. Reilly, 2 Dill. 127.) State laws as to exemption from levy and sale on execution will be followed. (In re Vogler, 2 Hughes, 297; In re Appold, 6 Phila. 469; In re Ruth, 6 Phila. 438.) So also as to the notice and mode and time of sale under execution. (Moncure v. Zants, 11 Wall. 416; Smith v. Cockrill, 6 Wall. 756; Pollard v. Cocke, 19 Ala. 188; Merchants' Bank v. Evans, 51 Mo. 335; see Byers v. Fowler, 12 Ark. 218.) If a state law requires an appraisal and sale at a certain price, a marshal's sale must conform to such law. (Smith v. Cockrill, 6 Wall. 756.) All the requisites under the state law must be observed. (Byers v. Fowler, 12 Ark. 218; Pollard v. Cocke, 19 Ala. 188; Merchants' Bank v. Evans, 51 Mo. 335.) Process substantially in compliance with state laws will not be set aside. (Johnson v. Healy, 9 Ben. 318.) Property under the state law subject to a levy may be taken on process issued out of the federal court. (Georgia v. Atlantic & G. R. R. Co., 3 Woods, 434.) Property exempt from execution under the state laws is exempt under execution issued out of a federal court. (In re Ruth, 1 Bank. Reg. 154.) A levy cannot be made on an insolvent administrator. (Williams v. Benedict, 8 How. 107.) A creditor cannot sell the property after appointment of a receiver without leave of the state court. (Wiswall v. Sampson, 14 How. 52.) So execution cannot be issued to affect property of a corporation in the hands of a receiver. (Levi v. Columbia F. Ins. Co., 1 Fed. Rep. 206; 1 McCrary, 34.) Property vested in a syndicate in insol-

veny proceedings cannot be levied on by process from the federal court. (*Bank v. Horn*, 17 How. 160.) Property exclusively under control of the probate court is not subject to execution on a judgment against an administrator in the circuit court. (*Youley v. Lavender*, 21 Wall. 276; *Kittredge v. Race*, 92 U. S. 116.) A return of property taken on a *fi. fa.* on execution of a forthcoming bond is governed by the state law. (*Amis v. Smith*, 16 Peters, 303.) State laws regulating final process have no application unless adopted by some act of Congress. (*Wayman v. Southard*, 10 Wheat. 1; *Ross v. Duval*, 13 Peters, 45; *Boyle v. Zacharie*, 6 Peters, 648.) So property levied on cannot be proceeded against according to the law of a state. (*Hall v. Yahooola R. M. Co.*, 1 Woods, 544.) Goods delivered to defendant on a forthcoming bond in replevin cannot be taken in replevin from federal courts. (*U. S. v. Dantzler*, 3 Woods, 719.) The principle of this section is applicable only where there is no rule on the same subject prescribed by act of Congress, and where the state rule is not in conflict with any such law. (*Ex parte Fisk*, 113 U. S. 713; and see *Bond v. Dustin*, 112 U. S. 604.) The section does not apply to the form of verdicts, or to the manner of giving instructions in the federal courts (*Abbott v. Curtis etc. Manuf. Co.*, 25 Fed. Rep. 402); nor does it apply to remedies upon judgments, those remedies being governed by the provisions of section 916 (*Lamaster v. Keeler*, 123 U. S. 376); nor do its provisions adopt the state law allowing equitable defenses in a legal action. (*Herklotz v. Chase*, 32 Fed. Rep. 433.) This section applies to the mode of service of process on corporations as well as on persons. It is a part of the practice and mode of proceeding in a suit. (*Amy v. Watertown*, 130 U. S. 301.) Where a particular method of serving process is pointed out by statute, that method must be followed, and the rule is especially exacting in reference to corporations. (*Kibbe v. Benson*, 17 Wall. 624; *Alexandria v. Fairfax*, 95 U. S. 774; *Settlemier v. Sullivan*, 97 U. S. 444; *Evans v. Dublin & D. R. Co.*, 14 Mees. & W. 142; *Walton v. Universal Salv. Co.*, 16 Mees. & W. 438; *Brydolf v. Wolf*, 32 Iowa, 509; *Hoen v. Atlantic & P. R. Co.*, 64 Mo. 561; *Lehigh Valley Ins. Co. v. Fuller*, 81 Pa. St. 398; *Congar v.*

Galena & C. U. R. Co., 17 Wis. 478; Watertown v. Robinson, 59 Wis. 513; 69 Wis. 230.)

§ 437. Attachments.—In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process; *provided*, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy. (Rev. Stats., sec. 915.)

Attachments.—A federal court cannot issue a writ of attachment before final judgment against a national bank, its jurisdiction in this regard being limited by all the restrictions imposed by statute (U. S. Rev. Stats., sec. 5242) upon state courts. (Butler v. Coleman, 124 U. S. 721.) This section applies only when process *in personam* has been served on the defendant (Chittenden v. Darden, 2 Woods, 437), when the auxiliary remedy by attachment is given (Nazro v. Cragin, 3 Dill. 494); and although a resident of the district, defendant cannot be proceeded against by attachment unless served with process in the district (Sadler v. Fallon, 2 Curt. 579), as no writ of attachment can be served on the property of a non-resident until found within the district and served with process *in personam* (Chittenden v. Darden, 2 Woods, 437); but if there are two districts within the state, a judgment creditor of one district may have an attachment in execution on his judgment. (Prevost v. Gorrell, 5 Week. Notes,

151.) The federal courts have no jurisdiction of suits by foreign attachments. (*Chittenden v. Darden*, 2 Woods, 437; but see *Guillou v. Fontaine*, 32 Leg. Int. 362.) A court commissioner has no power to issue the writ. (*Chittenden v. Darden*, 2 Woods, 437.) The exercise of the jurisdiction conferred upon the circuit courts by this section necessarily draws to itself everything properly incidental, even though it may bring into the court, for the adjudication of their rights, parties not otherwise subject to its jurisdiction. (*Gumbel v. Pitkin*, 124 U. S. 131.) A state court has no jurisdiction of an action of replevin to recover property attached under the authority of a federal court. (*Krippendorf v. Hyde*, 110 U. S. 276. And see *Covell v. Heyman*, 111 U. S. 176; *Tua v. Curriere*, 117 U. S. 201; *Beckett v. Sheriff Hartford County*, 21 Fed. Rep. 32.)

§ 438. Execution in common-law causes.—The party recovering a judgment in any common-law cause in any circuit or district court shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise. (Rev. Stats., sec. 916.)

Remedies and rules to govern.—Federal courts may adopt rules to regulate proceedings so as to conform to those of the state (*Beers v. Houghton*, 9 Peters, 329; *Ross*

v. Duval, 13 Peters, 45); but a rule made by a district judge will not be considered binding unless he be qualified to exercise the powers of a circuit judge. (*Amis v. Smith*, 16 Peters, 303.) They may adopt the state law as a whole, but not in part. (*McCracken v. Hayward*, 2 How, 608.) The power so to adopt the state law extends to future as well as past legislation, and to modes of procedure as well as forms of process. (*Ross v. Duval*, 13 Peters, 45.) The process on judgment is similar to that allowed in state courts. (*U. S. v. Humphreys*, 3 Hughes, 201.) So a judgment creditor may have the same remedy against a municipal corporation as the state law allows against a private person. (*New Orleans v. Morris*, 3 Woods, 115.) So if the state law allows an attachment on the judgment, the same remedy is available in the federal courts (*Pearce v. Winter Iron Works*, 32 Ala. 68); but state rules relating to attachment of mortgaged property do not apply to an attachment issued on a judgment unless adopted. (*Howe v. Freeman*, 80 Mass. 566.) The Congress adopted both the form and effect of executions as established by state laws. (*Koning v. Bayard*, 2 Paine, 251; see *Bank v. Halstead*, 10 Wheat. 51; *U. S. v. Graves*, 2 Brock. 379.) So execution cannot be levied on property if the state law prohibits it. (*Williams v. Benedict*, 8 How. 107.) If the state law provides that a sale on execution discharges all liens, the purchaser under an execution issued by a federal court obtains a good title. (*Brown v. Bacon*, 27 Miss. 589.) A sale under a junior judgment in the state court will not prevent a sale under a prior judgment of a federal court. (*Andrews v. Wilkins*, 7 Miss. 554.) The state court will, on sale under a prior judgment, order the surplus to be paid to the marshal. (*Coughlan v. White*, 66 N. C. 102; see *Bonaffee v. Fisk*, 21 Miss. 682.) In garnishment proceedings, see *Canal & C. Sts. R. R. Co. v. Hart*, 114 U. S. 654. In proceedings supplementary to execution, see *Ex parte Boyd*, 105 U. S. 647.

Lien of judgment of federal court.—The lien of judgments on property within the jurisdiction depends upon the state law where Congress has not prescribed a different rule (*Williams v. Benedict*, 8 How. 107); the

proceedings in the federal courts are governed solely by acts of Congress (*Corwin v. Benham*, 2 Ohio St. 36); and judgments of federal courts have the same lien that judgments in the state court have. (*Williams v. Benedict*, 8 How. 107; *Ward v. Chamberlain*, 2 Black. 430; *Carroll v. Watkins*, 1 Abb. U. S. 474; *Koning v. Bayard*, 2 Paine, 251; *Pollard v. Cocke*, 19 Ala. 188; *Trapwall v. Richardson*, 13 Ark. 543; *Byers v. Fowler*, 12 Ark. 218; U. S. v. *Duncan*, 12 Ill. 523; *Simpson v. Niles*, 1 Ind. 192; *Sellers v. Corwin*, 5 Ohio, 398; *Lawrence v. Belger*, 31 Ohio St. 175.) Where the state law creates a lien only in the county where judgment is entered, the lien in the federal court is, notwithstanding, to the extent of its territorial jurisdiction in the district (*Massingill v. Downs*, 7 How. 760; *Shrew v. Jones*, 2 McLean, 78; see *Lombard v. Bayard*, 1 Wall. Jr. 196); so if there is more than one district in the state, when process can be issued throughout the state (*Manhattan Co. v. Evertson*, 6 Paige, 457), and it is not necessary that a copy be filed with the clerk of any county of the state. (*Cropsey v. Crandall*, 2 Blatchf. 341; *Shrew v. Jones*, 2 McLean, 78; U. S. v. *Scott*, 3 Woods, 334; but see *Tarpley v. Hamer*, 17 Miss. 310; *Reid v. House*, 2 Humph. 576.) The lien arises from the fact that its effect, and that of process thereon, are the same as judgments of the state court. (U. S. v. *Morrison*, 4 Pet. 124; *Barth v. Makeever*, 4 Biss. 206; U. S. v. *Humphreys*, 3 Hughes, 201; *Shew v. Jones*, 2 McLean, 78; *Lombard v. Bayard*, 1 Wall. Jr. 196.) A levy and sale of lands under a *pluries* execution while a prior levy remains undisposed of is a mere irregularity which can only be taken advantage of in apt time. (*Kerr v. South Park Comm'rs*, 8 Biss. 276.) A suit *in rem* for forfeiture of property by reason of violation of the internal revenue law is a "common-law cause" within the meaning of this section. (*A Quant. of Manuf. Tobacco*, 10 Ben. 147. See act of August 1, 1888.)

§ 439. Supreme court to regulate the practice of circuit and district courts.—The supreme court shall have power to prescribe, from time to time, and in any manner

not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts. (Rev. Stats., sec. 917.)

The power conferred is not only to make rules, but to make them from time to time. (The *St. Lawrence*, 1 Black, 522.) The supreme court may make rules to regulate mere matters of practice in equity (*Pierpont v. Fowle*, 2 Wood. & M. 23), as by allowing defendant to plead to part of a bill, and demur to a part. (*Pierpont v. Fowle*, 2 Wood. & M. 23.) Such rules are obligatory on the circuit court (*Ex parte Poultney*, 12 Pet. 472; *Ex parte Whitney*, 13 Pet. 404); and no practice in the circuit court inconsistent therewith is admissible to control them (*Bank v. White*, 8 Pet. 262); but rules prescribed by the supreme court do not exclude other rules and usages of the circuit courts (*Van Hook v. Pendleton*, 2 Blatchf. 85), as enlarging the time of appearing, and answering when justice requires it (*Poultney v. La Fayette*, 12 Pet. 472); but the circuit courts have no power to make rules inconsistent with the rules prescribed by the supreme court (*Story v. Livingston*, 13 Pet. 359; *Gaines v. Relf*, 15 Pet. 9; *Bein v. Heath*, 12 How. 168; *Jenkins v. Greenwald*, 1 Bond, 126), as a rule adopting a state law as to the rights and obligations of parties to injunction bonds. (*Bien v. Heath*, 12 How. 168.) Rules prescribed by the supreme court have the force and effect of statutory provisions (*The Delaware, Olcott*, 240; *The Young America*, Newb. Adm. 107; *The Asa R. Swift*, Newb. Adm. 553; *Gaines v. Travis*, Abb. Adm. 422; *The Illinois*, 1 Brown Adm. 13), but it can make no rule to conflict with an act of Con-

gress (*Gray v. C. I. & N. R. R. Co.*, 1 Wool. 63), as a rule making judgments or decrees for money a lien on land, or to displace any land where the same is conferred by law. (*Ward v. Chamberlain*, 2 Black, 430.) Although it cannot by rule affect the jurisdiction conferred by law, yet it may regulate proceedings and process. (*The St. Lawrence*, 1 Black, 522.)

§ 440. Practice in the several courts to be regulated by their own rules.—The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the supreme court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. (Rev. Stats., sec. 918.)

Rules.—Under this section federal courts may by rule require parties to print their briefs (*Neff v. Pennoyer*, 3 Saw. 335); or may pass a rule for making up the trial docket, and make the clerk's fee part of taxable costs (*The Alice Taintor*, 14 Blacthf. 225); or a rule which dispenses with proof of execution of a bond, bill, or note, unless defendant files an affidavit denying the execution (*Mills v. Bank*, 11 Wheat. 131); or it may adopt the form of a bill of exceptions as known at common law (*Pomeroy v. State Bank*, 1 Wall. 592); but no rule can exclude competent evidence. (*Patterson v. Winn*, 5 Pet. 233.) Federal courts may regulate their own process, and prescribe rules for the collection and disposition of moneys, and compel their observance by attachment. (*The Laureus*,

1 Abb. Adm. 503.) And with consent of parties a cause may, under a rule, be referred to a referee to hear and report his determination to the court. (Thornton v. Carson, 7 Cranch, 596; Alexandria Canal Co. v. Swann, 5 How. 83; Heckers v. Fowler, 2 Wall. 123.) A court may suspend its rules or except a case from their operation. (U. S. v. Breitling, 20 How. 252; Russell v. McLellan, 3 Wood. & M. 157; Wallace v. Clark, 3 Wood. & M. 359.) It is not essential that it adopt written rules, it may be established by uniform practice of a series of years. (Fullerton v. Bank, 1 Pet. 604; Duncan v. U. S., 7 Pet. 435; U. S. v. Stevenson, 1 Abb. U. S. 495; Koning v. Bayard, 2 Paine, 251; Sellers v. Corwin, 5 Ohio, 398.) And a decision on a subject establishes the practice. (Duncan v. U. S., 7 Pet. 435.) Section 914, adopting the practice of the several states, should be construed in connection with this section. (Osborne v. City of Detroit, 28 Fed. Rep. 385.)

§ 441. Suits for duties.—All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States. (Rev. Stats., sec. 919.)

§ 442. Consolidation of revenue seizures. Whenever two or more things belonging to the same person are seized for an alleged violation of the revenue laws, the whole must be included in one suit; and if separate actions are prosecuted in such cases, the court shall consolidate them. (Rev. Stats., sec. 920.)

§ 443. Orders to save costs.—When causes of a like nature or relative to the same question are pending before a court of the United States, or of any territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so. (Rev. Stats., sec. 921.)

Costs.—If a party has two or more causes of action of the same kind he may be compelled to consolidate and pay the costs of the application. (*Bank v. Young*, 1 Cranch C. C. 458; *Wolverton v. Lacey*, 18 Law Rep. 672.) The practice to consolidate under this section is a common practice. (*U. S. v. U. Pac. R. R. Co.*, 98 U. S. 569.) If several suits involve the same questions, and the attorneys for defendants consent that judgment may abide the event of a trial of one case, an order may be entered that the decree entered in the case selected for trial shall be entered in the other cases. (*Andrews v. Spear*, 4 Dill. 170.) So the court may order several actions against several insurance companies to be tried before the same jury if the questions and the evidence are the same and the counsel the same. (*Weide v. Insurance Co.*, 3 Chic. L. N. 352.)

§ 444. When the marshal is a party.—When the marshal or his deputy is a party in any cause, the writs and precepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them. (Rev. Stats., sec. 922.)

A deputy marshal cannot plead in abatement that the writ was not directed to and served by a disinterested person. (*Knox v. Summers*, 3 Cranch, 496.)

§ 445. Seizures for forfeiture in certain cases.—When any vessel, goods, wares, or merchandise are seized by any officer of the customs, and prosecuted for forfeiture by virtue of any law respecting the revenue, or the registering and recording, or the enrolling and licensing of vessels, the court shall cause fourteen days' notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and by posting up the same in the most public manner for the space of fourteen days, at or near the place of trial; and proclamation shall be made in such manner as the court shall direct. And if no person appears and claims such vessel, goods, wares, or merchandise, and gives bond to defend the prosecution thereof, and to respond the cost in case he shall not support his claim, the court shall proceed to hear and determine the cause according to law. (Rev. Stats., sec. 923.)

§ 446. Attachment in postal suits.—In all cases where debts are due from defaulting or delinquent postmasters, contractors, or other officers, agents, or employees of the post-office department, a warrant of attachment may issue

against all real and personal property and legal and equitable rights belonging to such officer, agent, or employee, and his sureties, or either of them, in the following cases:—

First. When such officer, agent, or employee, and his sureties, or either of them, is a non-resident of the district where such officer, agent, or employee was appointed, or has departed from such district for the purpose of permanently residing out of the same, or of defrauding the United States, or of avoiding the service of civil process.

Second. When such officer, agent, or employee, and his sureties, or either of them, has conveyed away, or is about to convey away, his property, or any part thereof, or has removed, or is about to remove, the same, or any part thereof, from the district wherein it is situate, with intent to defraud the United States.

And when any such property has been removed, certified copies of the warrant may be sent to the marshal of the district into which the same has been removed, under which certified copies he may seize said property and convey it to some convenient point within the jurisdiction of the court from which the warrant originally issued. And alias warrants may be issued in such cases upon due application, and the validity of the warrant first issued shall continue until the return day thereof. (Rev. Stats., sec. 924.)

§ 447. Application for warrant.—Application for such warrant of attachment may be made by any district or assistant district attorney, or any other person authorized by the postmaster-general, before the judge, or, in his absence, before the clerk of any court of the United States having original jurisdiction of the cause of action. And such application shall be made upon an affidavit of the applicant, or of some other credible person, stating the existence of either of the grounds of attachment enumerated in the preceding section, and upon production of legal evidence of the debt. (Rev. Stats., sec. 925.)

§ 448. Issuing warrant—Duty of clerk and marshal.—Upon any such application, and upon due order of any judge of the court, or, in his absence, without such order, the clerk shall issue a warrant for the attachment of all the property of any kind belonging to the person specified in the affidavit, which warrant shall be executed with all possible dispatch by the marshal, who shall take the property attached, if personal, into his custody, and hold the same subject to all interlocutory or final orders of the court. (Rev. Stats., sec. 926.)

§ 449. Ownership of attached property—Trial.—At any time within twenty days before the return day of such warrant, the party whose property is attached may, on giving notice to the district attorney of his in-

tention, file a plea in abatement, traversing the allegations of the affidavit, or denying the ownership of the property attached to be in the defendants or either of them; in which case the court may, upon application of either party, order an immediate trial by jury of the issues raised by the affidavit and plea; but the parties may, by consent, waive a trial by jury, in which case the court shall decide the issues raised. And any party claiming ownership of the property attached, and a specific return thereof, shall be confined to the remedy herein afforded; but his right to an action of trespass, or other action for damages, shall not be impaired hereby. (Rev. Stats., sec. 927.)

§ 450. Proceeds of attached property.

—When the property attached is sold on any interlocutory order of the court or is producing any revenue, the money arising from such sale or revenue shall be invested in securities of the United States, under the order of the court, and all accretions shall be held subject to the orders of the same. (Rev. Stats., sec. 928.)

§ 451. Publication of attachment.—Immediately upon the execution of any such warrant of attachment, the marshal shall cause due publication thereof to be made, in the case of absconding debtors for two months, and of non-residents for four months. The publication shall be made in some newspaper published in the district where the property is sit-

uate, and the details thereof shall be regulated by the order under which the warrant is issued. (Rev. Stats., sec. 929.)

§ 452. Property of defendants accounting, etc.—After the first publication of such notice of attachment as required by law, every person indebted to, or having possession of any property belonging to, the said defendants, or either of them, and having knowledge of such notice, shall account and answer for the amount of such debt and the value of such property; and any disposal or attempt to dispose of any such property, to the injury of the United States, shall be illegal and void. And when the person indebted to, or having possession of the property of, such defendants, or either of them, is known to the district attorney of marshal, such officer shall see that personal notice of the attachment is served upon such person, but the want of such notice shall not invalidate the attachment. (Rev. Stats., sec. 930.)

§ 453. Discharge of attachment—Bond.
—Upon application of the party whose property has been attached, the court, or any judge thereof, may discharge the warrant of attachment as to the property of the applicant, provided such applicant shall execute to the United States a good and sufficient penal bond, in double the value of the property attached, to be approved by a judge of the court, and with condition for the return of said property,

or to answer any judgment which may be rendered by the court in the premises. (Rev. Stats., sec. 931.)

§ 454. Accrued rights not to be abridged.

—Nothing contained in the preceding eight sections shall be construed to limit or abridge, in any manner, such rights of the United States as have accrued or been allowed in any district under the former practice of, or the adoption of state laws by, the United States courts. (Rev. Stats., sec. 932.)

§ 455. Attachments dissolved in conformity with state laws.—An attachment

of property, upon process instituted in any court in the United States, to satisfy such judgment as may be recovered by the plaintiff therein, except in the cases mentioned in the preceding nine sections, shall be dissolved when any contingency occurs by which, according to the laws of the state where said court is held, such attachment would be dissolved upon like process instituted in the courts of said state; *provided*, that nothing herein contained shall interfere with any priority of the United States in the payment of debts. (Rev. Stats., sec. 933.)

§ 456. Property taken under revenue laws irrepleviable.—All property taken or detained by any officer or other person, under authority of any revenue law of the United

States, shall be irrepleviable, and shall be deemed to be in the custody of the law, and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof. (Rev. Stats., sec. 934.)

Note.—Property levied on by a collector of internal revenue. (O'Reilly v. Good, 42 Barb. 520; Brice v. Elliott, 22 Int. Rev. Rec. 206.)

§ 457. Garnishees in suits by the U. S. on notes, etc.—In any suit by the United States against a corporation for the recovery of money upon a bill, note, or other security, the debtors of the corporation may be summoned as garnishees; and it shall be the duty of any person so summoned to appear in open court and to depose, in writing, to the amount which he was indebted to the said corporation at the time of the service of the summons and at the time of making such deposition; and judgment may be entered in favor of the United States for the sum admitted by such garnishee to be due to the said corporation, in the same manner as if it had been due to the United States; *provided*, that no judgment shall be entered against any garnishee until after judgment has been rendered against the corporation defendant to the said action, or until the sum in which the garnishee stands indebted is actually due. (Rev. Stats., sec. 935.)

§ 458. Issue tendered when garnishee denies indebtedness.—When any person

summoned as garnishee deposes in open court that he is not, and was not at the time of the service of the service of summons, indebted to such corporation, an issue may be tendered by the United States upon such demand, and if, upon the trial of that issue, a verdict is rendered against the garnishee, judgment shall be entered in favor of the United States, pursuant to such verdict, with costs of suit. (Rev. Stats., sec. 936.)

§ 459. Garnishee failing to appear.— If any person summoned as garnishee, as aforesaid, fails to appear at the term of the court to which he is summoned, he shall be subject to attachment for contempt of the court. (Rev. Stats., sec. 937.)

§ 460. Bailing of property seized under customs laws.— Upon the prayer of any claimant to the court, that any vessel, goods, wares, or merchandise, seized and prosecuted under any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, or any part thereof, should be delivered to him, the court shall appoint three proper persons to appraise such property, who shall be sworn in open court, or before a commissioner appointed by the district court to administer oaths to appraisers for the faithful discharge of their duty; and the appraisement shall be made at the expense of the party on

whose prayer it is granted. If, on the return of the appraisement, the claimant, with one or more sureties, to be approved by the court, shall execute a bond to the United States for the payment of a sum equal to the sum at which the property prayed to be delivered is appraised, and produce a certificate from the collector of the district where the trial is had, and of the naval officer thereof, if any there be, that the duties on the goods, wares, and merchandise, or tonnage duty on the vessel so claimed, have been paid or secured in like manner as if the same had been legally entered, the court shall, by rule, order such vessel, goods, wares, or merchandise to be delivered to such claimant; and the said bond shall be lodged with the proper officer of the court. If judgment passes in favor of the claimant, the court shall cause the said bond to be canceled; but if judgment passes against the claimant, as to the whole or any part of such vessel, goods, wares, or merchandise, and the claimant does not, within twenty days thereafter, pay into the court, or to the proper officer thereof, the amount of the appraised value of such vessel, goods, wares, or merchandise so condemned, with the costs, judgment shall be granted upon the bond, on motion in open court, without further delay. [See sec. 570.] (Rev. Stats., sec. 938.)

Security, how taken.—The security may be taken by a sealed instrument or by a stipulation in the nature

of a recognizance (*The Alligator*, 1 Gall. 145; *McLellan v. U. S.*, 1 Gall. 227; *The Octavia*, 1 Mason, 149); but the best course is to take a stipulation. (*The Alligator*, 1 Gall. 145.) The stipulation is deemed a mere substitute for the thing itself, and the stipulators are liable to the exercise of all those powers on the part of the court which it could properly exercise if the thing itself were still in its custody. (*The Palmyra*, 12 Wheat. 1; *Newell v. Norton*, 3 Wall. 257.) The exercise of authority on the part of court, where the sureties will be affected injuriously, is in the discretion of the court. (*The Palmyra*, 12 Wheat. 1.) Even without any statute the admiralty may take a stipulation (*The Alligator*, 1 Gall. 145; *McLellan v. U. S.*, 1 Gall. 227; *Place v. Norwich*, 1 Ben. 89; *U. S. v. Four Pieces*, 1 Paine, 435); and a void bond may be good as a stipulation. (*The Alligator*, 1 Gall. 145.) The government has a right to be heard as to the propriety of a delivery on bail, and no delivery ought to be made until all objections have been heard and considered (*Ex parte Robbins*, 2 Gall. 320); and the court may refuse to deliver on a stipulation unless upon condition that it carry interest. (*The Santa Maria*, 10 Wheat. 431.)

Procedure on stipulation.—The court may require full proof of the allegations in the libel (*The Lion*, 1 Sprague, 399); but if there is no claim, no proof of the facts is required. (*The Lion*, 1 Sprague, 399; *The Mary Anne*, 1 Ware, 104.) If the stipulation is joint and several, libellants may take separate judgments and executions against the surviving parties on the bond or proceed against the representatives. (*The Octavia*, 1 Mason, 149.) Judgment on the bond ought to be in open court after the lapse of twenty days, and not before. (*McLellan v. U. S.*, 1 Gall. 227.) Judgment and execution may be awarded in a summary manner on a stipulation. (*The Gran Para*, 10 Wheat. 497; *The Alligator*, 1 Gall. 145; *The Baltic*, Blatchf. & H. 149.) The ultimate adjudication of the cause is not complete till judgment is awarded on the bond. (*McLellan v. U. S.*, 1 Gall. 1.)

§ 461. Sale after condemnation.—All vessels, goods, wares, or merchandise which

shall be condemned by virtue of any law respecting the revenue from imports or tonnage, or the registering and recording, or the enrolling and licensing of vessels, and for which bonds shall not have been given by the claimant, shall be sold by the marshal or other proper officer of the court in which condemnation shall be had, to the highest bidder, at public auction, by order of such court, and at such place as the court may appoint, giving at least fifteen days' notice (except in cases of perishable merchandise) in one or more of the public newspapers of the place where such sale shall be; or if no paper is published in such place, in one or more of the papers published in the nearest place thereto; for which advertising a sum not exceeding five dollars shall be paid. And the amount of such sales, deducting all proper charges, shall be paid within ten days after such sale by the person selling the same, to the clerk or other proper officer of the court directing such sale, to be by him, after deducting the charges allowed by the court, paid to the collector of the district in which such seizure or forfeiture has taken place, as hereinbefore directed. (Rev. Stats., sec. 939.)

§ 462. In cases of seizure, bailing of property in vacation.—In any cause of admiralty and maritime jurisdiction, or other case of seizure, depending in any court of the United States, any judge of the said court, in vacation, shall have the same authority to

order any vessel or cargo or other property to be delivered to the claimants, upon bail or bond, or to be sold when necessary, as the said court has in term time, and to appoint appraisers, and exercise every other incidental power necessary to the complete execution of the authority herein granted; and the recognizance of bail or bond, under such order, may be executed before the clerk upon the party's producing the certificate of the collector of the district, of the sufficiency of the security offered; and the same proceedings shall be had in case of said order of delivery or of sale as are had in like cases when ordered in term time; *provided*, that upon every such application, either for an order of delivery or of sale, the collector and the attorney of the district shall have reasonable notice in cases of the United States, and the party or counsel in all other cases. (Rev. Stats., sec. 940.)

§ 463. Delivery bond in admiralty proceedings.—When a warrant of arrest or other process *in rem* is issued in any cause of admiralty jurisdiction, except the cases of seizure for forfeiture under any law of the United States, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the court where the cause is pend-

ing, or, in his absence, by the collector of the port, conditioned to answer the decree of the court in such cause. Such bond or stipulation shall be returned to the court, and judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause. (Rev. Stats., sec. 941.)

When a vessel is released on stipulation she returns into the custody of her owner (The Old Concord, 1 Brown, 270; The Union, 4 Blatchf. 90) discharged of the lien for which she was seized (The Old Concord, 1 Brown, 270), but subject to all previous liens or charges (The Union, 4 Blatchf. 90), and subsequent accruing liens or charges (The Union, 4 Blatchf. 90); and the court cannot, in the absence of fraud, order her redelivery to the marshal (The Union, 4 Blatchf. 90; The White Squall, 4 Blatchf. 108; The Huntsville, 3 Woods, 386); and the court has no longer jurisdiction to order her sale, the sureties taking her place (The Hiram Wood, 6 Chic. L. N. 135); and she cannot again be taken for the same cause of action (The Thales, 3 Ben. 327), although the sureties become insolvent (The Old Concord, 1 Brown, 270); but if there be fraud or mistake the court may relieve the parties within a reasonable time, and order her back into custody of marshal (The Union, 4 Blatchf. 90); and if delivered on a stipulation signed by a *feme covert* it may be again seized. (The Favorite, 25 Int. Rev. Rec. 202.) After a release the court cannot order the proceeds of a sale to be brought into court (The Union, 4 Blatchf. 90), nor can the libelants participate in the proceeds of the sale under a subsequent libel where there was no fraud. (The Josephine, 4 Cent. L. J. 262. See The Madge, 31 Fed. Rep. 926; The Belgenland v. Jensen, 108 U. S. 157.)

§ 464. Special bail in suits for duties and penalties.—In all suits or prosecutions for the recovery of duties or pecuniary penal-

ties prescribed by the laws of the United States, commenced in any state where, by the laws thereof, imprisonment for debt shall not have been abolished, the person against whom process is issued shall be held to special bail, subject to the rules which prevail in civil suits in which special bail is required. (Rev. Stats., sec. 942.)

Note.—The marshal may detain the defendant until bail is given, and for that purpose may commit him to prison. (Palmer v. Allen, 7 Cranch. 550; U. S. v. Mundel, 1 Hughes, 415.) Bail cannot be required unless the affidavit shows probable cause where the state law so requires. (Leonard v. Caskin, Bee, 146.)

§ 465. Defendant giving bail in one district committed in another.—When a defendant who has procured bail to respond to the judgment in a suit in any court of the United States in any district is afterward arrested in any other district, and is committed to a jail, the use of which had been ceded to the United States for the custody of prisoners, the judge of the court wherein the suit in which the defendant has so procured bail is depending shall, at the request of the bail, order that such defendant be held in said jail, in the custody of the marshal of the district in which it is. The said marshal, upon the delivery of such order, duly authenticated, shall receive such person into his custody, and thereupon be chargeable for an escape, and shall forthwith make a certificate, under his hand

and seal, of such commitment, and transmit the same to the court from which the order issued, and, if required, shall make and deliver to such bail, or to his attorney, a duplicate thereof. Upon the return of such certificate, the court which made the said order, or any judge thereof, may direct that an *exoneretur* be entered upon the bail piece, where special bail shall have been found, or otherwise discharge such bail. (Rev. Stats., sec. 943.)

§ 466. Allowing prisoners to escape.—Whenever any marshal, deputy marshal, ministerial officer, or other person, has in his custody any prisoner by virtue of process issued under the laws of the United States by any court, judge, or commissioner, and such marshal, deputy marshal, ministerial officer, or other person, voluntarily suffers such prisoner to escape, he shall be fined not more than two thousand dollars, or imprisoned for a term not more than two years, or both. (Rev. Stats., sec. 5409.)

§ 467. Application of preceding section.—The preceding section shall be construed to apply not only to cases in which the prisoner who escaped was charged or found guilty of an offense against the laws of the United States, but also to cases in which a prisoner may be in custody charged with offenses against any foreign government with which the United States have treaties of extradition. (Rev. Stats., sec. 5410.)

§ 468. Defendant held until judgment.

—When a defendant is committed by virtue of the order provided in the preceding section, he shall, unless sooner discharged by law, be holden in jail until final judgment is rendered in the suit in which he procured bail as aforesaid, and sixty days thereafter, if such judgment is rendered against him, in order that he may be charged in execution, which may, in such cases, be directed to and served by the marshal in whose custody he is. (Rev. Stats., sec. 944.)

§ 469. Bail and affidavits taken by commissioners.—Bail and affidavits, when required or allowed in any civil cause in any circuit or district court, may be taken by a commissioner of the circuit court for the district; and such acknowledgments of bail and affidavits shall have the same effect as if taken before any judge of such courts. (Rev. Stats., sec. 945.)

A commissioner may take affidavits in civil proceedings for arrest in conformity with state laws (Fulton v. Gilmore, 10 Chic. L. N. 108); but a commissioner in one circuit cannot authenticate a stipulation to take effect in another circuit. (Sawyer v. Oakman, 11 Blatchf. 65.) In the absence of a rule of court providing otherwise, appeal bonds may be taken before a United States commissioner. (The Canary, No. 2 Cir. Ct. Ala., 22 Fed. Rep. 536.)

§ 470. Calling of bail, in Kentucky.—When a bail bond is given for the appearance of any person to answer in the district or cir-

cuit court for the district of Kentucky, the clerk of such court shall call the party at the time he is bound to appear. If the party fails, the clerk shall enter such failure on his minutes, and on said entry judgment may afterward be made of record by the court; but if the party appears, the clerk shall take another bond, with sureties similar to the first, for further appearance at the next succeeding term of the court, and if the party fails to give such other bond and surety, he shall stand committed by order of the clerk until he complies. (Rev. Stats., sec. 946.)

§ 471. When clerks may take bail de bene esse.—Recognizances of special bail may be taken *de bene esse* by the clerks of the circuit and district courts, in the absence or in case of the disability of the judges, in any action depending in either of the said courts, where special bail is demandable. (Rev. Stats., sec. 947.)

§ 472. Amendment of process.—Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues. (Rev. Stats., sec. 948.)

Note.—If a summons did not issue from the court, it cannot be amended. (Dwight v. Merritt, 4 Fed. Rep. 614;

18 Blatchf. 305.) The circuit court may allow amendment of a writ of error which is made returnable on the wrong day. (*Semmes v. U. S.*, 91 U. S. 21.)

§ 473. Priority of state cases.—When a state is a party, or the execution of the revenue laws of a state is enjoined or stayed, in any suit in a court of the United States, such state, or the party claiming under the revenue laws of a state, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties. (*Rev. Stats.*, sec. 949.)

Note.—This statute is not imperative (*Hoge v. Richmond & D. R. R. Co.*, 93 U. S. 1); but a motion cannot be advanced on the calendar, unless made by a state, or a party claiming under the laws of a state. (*Ward v. State*, 12 Wall. 163.) A motion to give priority to a case is not granted as of course, even with the concurrence of both parties (*Miller v. State*, 12 Wall. 159); it is for the court to determine what is "sufficient reason" for this preference under all the circumstances (*Hoge v. Richmond & D. R. R. Co.*, 93 U. S. 1); and preference will not be given where the execution of the revenue laws of a state is enjoined, unless it appears that the operations of the state government will be embarrassed. (*Hoge v. Richmond & D. R. R. Co.*, 93 U. S. 1.) A suit in the nature of a *quo warranto* to try the title to office in a private corporation is not entitled to priority. (*Miller v. State*, 12 Wall. 159.) So the ordinances of a municipal corporation are not entitled to priority. (*Davenport City v. Dows*, 15 Wall. 390.)

§ 474. Notice of case for trial.—In all civil actions in the courts of the United States

either party may notice the same for trial. (Rev. Stats., sec. 950.)

§ 475. Suits of U. S. against individuals.—In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States, or by some unavoidable accident. (Rev. Stats., sec. 951.)

Suits brought by the United States.—This section embraces every suit between the United States and an individual (U. S. v. Ingersoll, Crabbe, 135; U. S. v. Barker, 1 Paine, 156); and no state law can effect the question of set-off on such an action. (U. S. v. Robeson, 9 Peters, 319; Reeside v. Walker, 11 How. 272; U. S. v. Eckford, 6 Wall. 484; Watkins v. U. S., 9 Wall. 759; U. S. v. Prentice, 6 McLean, 65.) The object of the act is to liquidate and adjust all accounts between the parties. (U. S. v. Wilkins, 6 Wheat. 135; U. S. v. Fillebrown, 7 Peters, 28; Gratiot v. U. S., 15 Peters, 336; U. S. v. Fitzgerald, 4 Cranch C. C. 203.) Judgment cannot be rendered against the United States for the excess of a set-off over the claim of the United States (Reeside v. Walker, 11 How. 272; U. S. v. Eckford, 6 Wall. 484; Schaumburg v. U. S., 35 Leg. Int. 29); nor can the assignee of a claim use it as a set-off, although the state law may allow it as a set-off in state courts. (U. S. v. Robeson, 9

Peters, 319.) Evidence may be given of a claim if it has been presented to the proper accounting officers, and by them disallowed. (U. S. v. Ruzzold, 8 Peters, 150; U. S. v. Smith, 1 Bond, 68; U. S. v. Corwin, 1 Bond, 149.) So of the claim of sureties on an official bond. (U. S. v. Giles, 9 Cranch, 212; but see Cox v. U. S., 6 Peters, 172.) So of a claim of a collector of internal revenue which has been rejected. (U. S. v. Kimball, 101 U. S. 726.) So where a claim was rejected by the secretary of the treasury. (U. S. v. MacDaniel, 7 Peters, 1.) A defendant may give evidence that money was collected under a judgment without proof that the claim has been presented to the proper officers and rejected. (Meyers v. U. S., 1 McLean, 493.) So a defendant may claim credits, though not presented and disallowed until after commencement of the suit. (U. S. v. Hawkins, 10 Peters, 125.) Where a claim has not been presented and disallowed, no evidence can be given concerning it, unless defendant has vouchers which he could not procure before. (Watkins v. U. S., 9 Wall. 759; Halliburton v. U. S., 13 Wall. 63; Railroad Co. v. U. S., 101 U. S. 541; U. S. v. Austin, 2 Cliff. 325; U. S. v. Ingersoll, Crabbe, 135; U. S. v. Smith, 1 Bond, 68; U. S. v. Duval, Gilp. 356; U. S. v. Barker, 1 Paine, 156.) Proof of a claim is not admissible until a proper foundation is laid by proof of its rejection, and parol evidence is inadmissible for that purpose (U. S. v. Gilmore, 7 Wall. 491); and in default of proof of rejection the claim should be withdrawn from the consideration of the jury (U. S. v. Gilmore, 7 Wall. 491; U. S. v. Smith, 1 Bond, 68); but an instruction cannot be given that defendant is not entitled to credits unless there is no evidence to support them. (U. S. v. Lamb, 12 Peters, 1.) No particular form of allowance or disallowance is required (U. S. v. Duval, Gilp. 356); but the suspension of a claim is not a disallowance. (U. S. v. Duval, Gilp. 356; U. S. v. Cadwallader, Gilp. 563.) A suspended claim may be allowed by the successor in office. (U. S. v. Cadwallader, Gilp. 563.) The bringing of an action for the balance that excludes the claim is a sufficient disallowance. (U. S. v. Duval, Gilp. 356.) An equitable claim that should have been allowed by an exercise of discretionary power may be admitted as a set-off. (U. S. v. MacDaniel, 7 Peters,

1; U. S. v. Ripley, 7 Peters, 18; U. S. v. Duval, Gilp. 356.) A credit or allowance made by the head of a department cannot afterwards be recalled. (U. S. v. Bank, 15 Peters, 377; U. S. v. Kuhn, 4 Cranch C. C. 401.) A claim for unliquidated damages cannot be used as a set-off. (U. S. v. Robeson, 9 Peters, 319; U. S. v. Buchanan, 8 How. 83; U. S. v. Williams, 5 McLean, 133; U. S. v. Wells, 2 Wash. C. C. 161.) So a claim for a new credit from another account cannot be received unless it has been first presented to the treasury department. (Cox v. U. S., 6 Peters, 172.) So a credit allowed to a quartermaster must first be presented at the treasury department. (U. S. v. Lent, 1 Paine, 117.) A charge against one claim on which there will be a balance cannot be used as a set-off against another claim. (U. S. v. Prentice, 6 McLean, 65.) A claim which requires legislative action is not a proper set-off. (U. S. v. MacDaniel, 7 Peters, 1; U. S. v. Buchanan, 8 How. 83; U. S. v. Williams, 5 McLean, 133; U. S. v. Wells, 2 Wash. C. C. 161.)

§ 476. **In suits under postal laws.**—No claim for a credit shall be allowed upon the trial of any suit for delinquency against a postmaster, contractor, or other officer, agent, or employee of the post-office department, unless the same has been presented to the sixth auditor, and by him disallowed, in whole or in part, or unless it is proved to the satisfaction of the court that the defendant is, at the time of trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said auditor a claim for such credit by some unavoidable accident. (Rev. Stats., sec. 952.)

Note.—If a statute does not give an allowance as a matter of right, the disallowance of the postmaster-general is conclusive; but if he is entitled to a claim as a

matter of right, he may use it as a set-off, although it be disallowed. (U. S. v. Davis, Deady, 294.) If a claim has not been presented to the sixth auditor, and by him disallowed, it cannot be used as a set-off, unless the party is in possession of vouchers which he could not before procure. (Ware v. U. S., 4 Wall. 617.)

§ 477. Bill of exceptions.—A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto. (Rev. Stats., sec. 953.)

Note.—If the bill is signed by the judge it is sufficient, though not sealed. (Geueres v. Campbell, 11 Wall. 193.) It is conclusive upon the supreme court which cannot assume that any material part of the evidence is omitted. (Bingham v. Cabot, 3 Dall. 19, 382.)

§ 478. Defects of form—Amendments.—No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than

those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe. (Rev. Stats., sec. 954.)

Amendments—In general.—This section is remedial, and should be liberally construed (*Parks v. Turner*, 12 How. 39; *Tobey v. Clafin*, 3 Sum. 379; *Gregg v. Gier*, 4 McLean, 308); but amendments are not allowed with such liberality in penal actions or forfeitures as in civil actions (*U. S. v. Batchelder*, 9 Int. Rev. Rec. 98); and a criminal information cannot be amended at the trial in any manner affecting the charge. (*Columbia v. Herlihy*, 1 McAr. 466.) The power to amend at common law was limited to trivial errors, and could not be exercised after final judgment (*Smith v. Allyn*, 1 Paine, 453; *Nelson v. Barker*, 3 McLean, 379); but this section empowers generally any United States court to disregard mere defects in form in giving judgment, except those which the party demurring sets down as the cause of the demurrer (*Rosenbach v. Dreyfuss*, 1 Fed. Rep. 394); and authorizes the allowance of amendments during the trial. (*Bamberger v. Terry*, 103 U. S. 40.) It embraces every step in the cause down to the judgment. (*Roach v. Hulings*, 16 Pet. 319.) Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others (*Tilton v. Corfield*, 93 U. S. 163); and amendments of mere form, not going to the merits, and not of such a character as to prejudice, will not entitle respondents to costs. (*The Edwin Post*, 6 Fed. Rep. 314.) A defect is formal when a defendant must of necessity be guilty of a breach of the law, and liable to an action if the declaration is true. (*Jacobi v. U. S.*, 1 Brock. 520.) This section, except the last clause, relates to defects which are mere matters of form, and the last clause embraces matters of substance. (*Smith v. Allyn*, 1 Paine, 153.) The power is confined to process and pleadings, and reaches all defects, but does not extend to the judg-

ment. (Smith v. Allyn, 1 Paine, 153.) It extends to actions brought by the United States. (Jacobi v. U. S., 1 Brock. 520.)

Discretion of court.—The allowance of amendments in general rests in the sound discretion of the court. (Ex parte Bradstreet, 7 Pet. 634; Wright v. Hollingsworth, 1 Pet. 165; Walden v. Craig, 9 Wheat. 576; U. S. v. Buford, 3 Pet. 12; Mathson v. Grant, 2 How. 263; U. S. v. Batchelder, 9 Int. Rev. Rec. 98.) And if the party is in no default they will be allowed without costs. (Lanning v. Dolph, 4 Wash. C. C. 624.) So where plaintiff was notified of the defect no costs will be allowed (Hockscher v. Binney, 3 Wood. & M. 333); but if it materially varies the line of the defense plaintiff may be required to pay all accrued costs. (Wright v. Hollingsworth, 1 Pet. 165; Corp. v. Beatty, 1 Cranch C. C. 234; Ferris v. Williams, 1 Cranch C. C. 281; Page v. Hodgson, 1 Cranch C. C. 508; Elliott v. Holmes, 1 McLean, 466; Pierce v. Strickland, 2 Story, 292; Fredler v. Carpenter, 2 Wood. & M. 211; Sanders v. Hamilton, 2 Hayw. 282.) The payment of costs is not a condition precedent, unless made so by order. (Wigfield v. Dyer, 1 Cranch C. C. 403; Wheaton v. Love, 1 Cranch C. C. 451; Butts v. Chapman, 1 Cranch C. C. 570.) Where the defendant misled the plaintiff, leave to amend the plea will be given only on payment of costs (Anonymous, 2 Wash. C. C. 270); so after plea of misnomer (Page v. Hodgson, 1 Cranch C. C. 508); or on leave to substitute a general denial (Krouse v. Sprogel, 1 Cranch C. C. 78); see Milburne v. Kearnes, 1 Cranch C. C. 77); an amendment may be allowed with the costs of the term only (Greeley v. Smith, 3 Story, 76); or the party applying may be required to pay the expenses of the adverse party. (U. S. v. Batchelder, 9 Int. Rev. Rec. 98.) An amendment varying the amount of damages was allowed after verdict on payment of costs and consent to a new trial. (Etting v. Campbell, 5 Blatchf. 183.) The granting or refusing leave to plead anew is in the discretion of the court (Good v. Martin, 1 Col. 406); and pleas filed before amendment may be allowed to stand, or defendant may plead *de novo* (Tiernan v. Woodruff, 5 McLean, 135; Wright v. Hollingsworth, 1 Pet. 165; Furniss

v. Ellis, 2 Brock. 14; Corp. v. Beatty, 1 Cranch C. C. 234; Bank v. Hyatt, 4 Cranch C. C. 38); but going to trial after amendment of a declaration without objection is a waiver of right to plead *de novo*. (Wright v. Hollingsworth, 1 Pet. 165.) Amendments to pleadings after two demurrers sustained are allowed in discretion, and the court will permit them on terms where the case is important, and to prevent part of plaintiff's remedy from being cut off. (Wilbur v. Abbot, 6 Fed. Rep. 817.) The court in its discretion may determine whether, on an amendment, the submission of the cause ought to be vacated. (Bamberger v. Terry, 103 U. S. 40.)

Continuance.—If a material amendment is allowed, the opposite party may have a continuance (Schnertzell v. Purcell, 1 Cranch C. C. 246; Corp v. Beatty, 1 Cranch C. C. 234; Elliott v. Holmes, 1 McLean, 466; Walker v. Johnson, 2 McLean, 255; Wyatt v. Harden, Hemp. 17; U. S. v. Whisky, 7 Phila. 603); and if defendant amend his plea plaintiff may have a continuance and costs also (Semmes v. O'Neale, 1 Cranch C. C. 246; Marsteller v. McLean, 1 Cranch C. C. 550; Short v. Wilkinson, 2 Cranch C. C. 22); or his option between a continuance and costs (Milburne v. Kearnes, 1 Cranch C. C. 77); or defendant may be required to pay the costs of the term (Krouse v. Sprogell, 1 Cranch C. C. 78); or all costs up to the time of filing the amendment (Semmes v. O'Neale, 1 Cranch C. C. 246; Marsteller v. McLean, 1 Cranch C. C. 550; Short v. Wilkinson, 2 Cranch C. C. 22; Anonymous, 2 Wash. C. C. 270.)

Process.—The United States courts have plenary power to allow amendments of process (Eberly v. Moore, 24 How. 147), where there is anything to amend by (Furniss v. Ellis, 2 Brock. 14; Randolph v. Barrett, 16 Pet. 138; Tayloe v. Warfield, 2 Cranch C. C. 248); and so of criminal process in matters of form (Anonymous, 1 Gall. 22); but if process is ineffectual no amendment can be made which would render it effectual. (Brown v. Pond, 5 Fed. Rep. 4.) The power granted is a power to amend a defect in process, and a power to amend a want of form in process (Dwight v. Merritt, 4 Fed. Rep. 616); as a ne-

glect to advance a writ with the cause of action (Miller v. Gegis, 4 McLean, 436), or a mistake of the clerk in the title in a writ. (Furniss v. Ellis, 2 Brock. 15); but see Albers v. Whitney, 1 Story, 310.) A writ calling defendant by a wrong name may be amended by consent (Elliott v. Holmes, 1 McLean, 466); as by striking out administrator and inserting executor (Randolph v. Barrett, 16 Pet. 138); or by correcting the corporate name of plaintiff (Georgetown v. Beatty, 1 Cranch C. C. 234); but leave to strike out the name of the wife may be refused. (Moore v. Carter, Hemp. 64.) A summons may be amended by the subsequent addition of the signature of the clerk, and seal of the court (Dwight v. Merritt, 4 Fed. Rep. 614; S. C. 18 Blatchf. 306); but a summons issued from a state court is not process within this section. (Dwight v. Merritt, 4 Fed. Rep. 614.) The court has discretion to permit an officer to amend his return with or without notice at any time (Richards v. Ladd, 6 Saw. 40), as to both mesne and final process. (Phoenix Ins. Co. v. Wright, 1 Fed. Rep. 775; Semmes v. U. S., 91 U. S. 21; French v. Edwards, 5 Saw. 266.) An execution may be made to conform to the judgment; (Murphy v. Lewis, Hemp. 17); so a *fiery facias* may be amended by striking out the name of the deceased plaintiff (Lane v. Beltzhoover, Taney, 110), and longer time be given to a state than to other parties. (Rhode Island v. Massachusetts, 12 Pet. 23.) A *capias* may be amended by inserting the christian name of the plaintiff (Birch v. Butler, 1 Cranch C. C. 319); but not so as to alter the name of the plaintiff. (Comegys v. Robb, 2 Cranch C. C. 141.) The return to a writ of peremptory *mandamus* may be amended (Supervisors v. Durant, 9 Wall. 736), even after the return day (Linthicum v. Remington, 5 Cranch C. C. 546), or after the marshal has ceased to hold office. (Cushing v. Laird, 4 Ben. 70.) A court of the United States, sitting as a court of law, has an equitable power over its own process to prevent abuse, oppression, and injustice, which power may be invoked by a stranger to the litigation, as incident to the jurisdiction already vested, and without regard to his own citizenship. (Gumbel v. Pitkin, 124 U. S. 131.)

Amendment to pleadings.—The court is authorized

at any time during the trial to allow an amendment to the pleadings, and where it has done so it rests in its discretion to determine whether the submission of the case ought not to be vacated. (*Bamberger v. Terry*, 103 U. S. 40.) Some amendments are permitted at any stage of the proceedings (*Walden v. Bodley*, 14 Pet. 156; *Keene v. Wheatley*, 4 Phila. 157); so a bill may be amended after demurrer sustained (*Hunt v. Rousmantere*, 2 Mason, 342; *Fisher v. Rutherford*, Bald. 188); as by making new parties even after the case has been remanded from the supreme court (*Russell v. Clark*, 7 Cranch, 69; *Caldwell v. Taggart*, 4 Pet. 190); or after hearing so as to make out a new case on the same subject-matter. (*Neale v. Neales*, 9 Wall. 1; *Battle v. Mut. L. Ins. Co.*, 10 Blatchf. 417.) The commissioner has no power to amend the complaint or warrant in an extradition case, or to supply defects by his certificate after the case is closed, and a writ of *certiorari* is served upon him. (*Ex parte Lane*, 6 Fed. Rep. 34.) Notice for leave to amend should be given to the adverse party. (*Good v. Martin*, 1 Col. 406.) A pleading may be amended so as to bring the case within the exception to the statute of limitations (*Piatt v. Vattier*, 9 Pet. 405; *The Harmony*, 1 Gall. 123; *Tierman v. Woodruff*, 5 McLean, 135); as that the fraud was not discovered until the time that would remove the bar of the statute. (*Wharton v. Lowrey*, 2 Dall. 364.) A plea of the statute of limitations can be amended only when shown necessary for the justice of the case. (*Thompson v. Afflick*, 2 Cranch C. C. 46.) Blanks may be filled in a declaration to avoid the statute of limitations on payment of costs. (*Ferris v. Williams*, 1 Cranch C. C. 281.) Leave to file a plea of the statute of limitations applied for out of time will be refused. (*Read v. Clark*, 3 McLean, 480.) Leave may be granted to verify pleadings as required by statute (*Loving v. Fairchild*, 1 McLean, 333); but not on the trial to the surprise of the plaintiff. (*Benedict v. Maynard*, 6 McLean, 21.)

Amendment as to parties.—A defect of parties may be cured by amendment (*Douglas v. Butler*, 6 Fed. Rep. 225); or by striking out parties (*Connelly v. Taylor*, 2 Peters, 566; *Cole S. M. Co. v. Virginia G. H. W. Co.*,

1 Saw. 470); or by substituting the proper party as plaintiff (*Essex Co. Nat. B'k v. B'k of Montreal*, 15 Am. Law Reg., N. S., 418); but it cannot be amended so as to make new parties (*Morris v. Barney*, 1 Cranch C. C. 245); nor so as to strike out or alter the name of one of the plaintiffs (*Moores v. Carter*, Hemp. 64; *Comegys v. Robb*, 2 Cranch C. C. 141); but it may be amended by inserting the names of the members of a firm (*Tibbs v. Parrott*, 1 Cranch C. C. 177); so an error in a name may be corrected (*Furniss v. Ellis*, 2 Brock. 14), as in the name of a corporation. (*Corp. of Georgetown v. Beatty*, 1 Cranch C. C. 234.) An amendment will be allowed, striking out a name from a petition (*Whitaker v. Pope*, 2 Woods, 463); and on a plea of misnomer plaintiff may amend as to the name of defendant (*Nelson v. Barker*, 3 McLean, 379; *Scully v. Briddle*, 2 Wash. C. C. 200. See *Craig v. Brown*, Pet. C. C. 139); or by striking out the name of a defendant. (*Greeley v. Smith*, 3 Story, 76.)

Plaintiff's pleadings.—The declaration may be amended at any stage of the trial if not actually committed to the jury (*Smith v. Barker*, 3 Day, 312); and a dismissal may be stricken out with leave to amend (*Lanning v. Dolph*, 4 Wash. C. C. 624); if a declaration fails to allege the matter in controversy it may be amended (*Lanning v. Dolph*, 4 Wash. C. C. 624), and the claim for damages may be increased. (*Gregg v. Gier*, 4 McLean, 208; *Good v. Martin*, 1 Col. 406.) A party may amend his complaint so as to demand two thirds instead of the entire property. (*Van Zandt v. Argentine Min. etc. Co.*, 6 Saw. 159.) The amended declaration is sufficient if it avers citizenship in the present tense (*Birdsall v. Perego*, 5 Blatchf. 251); but a complainant cannot abandon his case and make a new and different one by amendments (*Sneed v. McCoull*, 12 How. 407; *Shields v. Barrow*, 17 How. 130; *Goodyear v. Bourn*, 3 Blatchf. 266.) It will not be allowed to change from an action on the case to an action in debt (*Ten Broeck v. Pendleton*, 5 Cranch C. C. 464; *Schoolfield v. Fitzhugh*, 1 Cranch C. C. 108); but it is allowed when the cause of action is not changed (*Fiedler v. Carpenter*, 2 Wood. & M. 211); as by adding a new count of a kindred cause of action (*Tiernan*

v. Woodruff, 5 McLean, 135); and founded on the same transaction, and admitting the same pleading, defense, and proof. (Tiernan v. Woodruff, 5 McLean, 135; U. S. v. Batchelder, 9 Int. Rev. Rec. 98.) A declaration may be amended so as to refer to the right statute. (Rosenbach v. Dreyfuss, 1 Fed. Rep. 391.) Plaintiff may be allowed to withdraw a replication, and file a denial or plea (McGill v. Shehee, 1 Cranch C. C. 40); but he cannot amend his replication after the jury is sworn. (Clark v. Mayfield, 3 Cranch C. C. 353.) After demurrer sustained the plaintiff is not entitled as matter of right to amend his bill; it is within the discretion of the court to allow it (National Bank v. Carpenter, 101 U. S. 567); and the order denying the motion to amend is not reviewable if the record does not show what amendment was desired (National Bank v. Carpenter, 101 U. S. 567); but plaintiff may show a subsequent capacity to sue after demurrer sustained. (Swartze v. Arnold, 1 Woolw. 353.)

Defendant's pleading.—A defendant may amend his plea (McGill v. Shehee, 1 Cranch C. C. 49), or withdraw a plea (Milburne v. Kearnes, 1 Cranch C. C. 77; Gill v. Patten, 1 Cranch C. C. 114; Short v. Wilkinson, 2 Cranch C. C. 22); or file an additional plea (Semmes v. O'Neale, 1 Cranch C. C. 246; Teesdale v. Jordan, 2 Hayw. 281); or add an affidavit thereto (Loving v. Fairchild, 1 McLean, 333); or he may withdraw his plea and demur (Deakins v. Lee, 1 Cranch C. C. 442; Krouse v. Sprogell, 1 Cranch C. C. 78; Alricks v. Slater, 1 Cranch C. C. 72; Bank v. Scott, 1 Cranch C. C. 134); or file a plea in abatement (Eberly v. Moore, 24 How. 147); or an additional plea, and amend those already filed. (Pollard v. Dwight, 4 Cranch, 433; Mar. Ins. Co. v. Hodgson, 6 Cranch, 206; U. S. v. Kirkpatrick, 9 Wheat. 720; Day v. Chism, 10 Wheat. 449.) New pleas should be allowed only where a good reason is shown for it, and on terms (Childs v. Lenig, 1 Wall. Jr. 305); but leave to file a special plea is allowed where it does not appear clearly bad (Gill v. Patten, 1 Cranch C. C. 114), and an insufficient plea will be rejected. (Kerr v. Force, 3 Cranch C. C. 3.) It will not be allowed if it essentially changes the ground of the defense unless for cogent reasons (Smith v. Babcock, 2 Wood. & M. 246;

Morehead v. Jones, 3 Wall. Jr. 306); and where the case is called for trial only when necessary for the justice of the case (**Bullock v. Van Delt**, Bald. 463; **Bastable v. Wilson**, 1 Cranch C. C. 124; **Allen v. Magruder**, 3 Cranch C. C. 6; **Childs v. Lenig**, 1 Wall. Jr. 305); and it cannot be filed after the jury has been sworn (**Lanning v. Dolph**, 4 Wash. C. C. 624), nor if judgment on demurrer has been affirmed on appeal. (**Mar. Ins. Co. v. Hodgson**, 1 Cranch C. C. 567.) The court will permit the withdrawal of a demurrer (**Suckley v. Slade**, 5 Cranch C. C. 123); but leave to amend a demurrer which did not go to the merits will be refused. (**Offutt v. Beatty**, 1 Cranch C. C. 213.) The fact of not setting out special defenses cannot be cured by filing special notice of defense. (**Doughty v. West**, 2 Fish. 553.) An amendment to the answer will not be allowed unless good cause and the use of diligence be shown. (**Lamb v. Parkman**, 21 Law Rep. 589.) An admission cannot be withdrawn if there is no allegation of mistake in fact or of law. (**Morehead v. Jones**, 3 Wall. Jr. 306; **Waterman v. Merrill**, 2 Abb. U. S. 478.) The amendment of an answer by the assertion of an additional fact was refused, where the fact was known, at the time the answer was filed. (**Cross v. Morgan**, 6 Fed. Rep. 241.) It is not allowed where due diligence has not been exercised (**Snead v. McCoull**, 12 How. 407; **Clifford v. Coleman**, 13 Blatchf. 210; **Ross v. Carpenter**, 6 McLean, 382; **Ind. Rubber Co. v. Phelps**, 8 Blatchf. 185; **Webster Loom Co. v. Higgins**, 13 Blatchf. 349; **Suydam v. Truesdale**, 6 McLean, 459); but it is not necessary that the new fact should be first established. (**Smith v. Babcock**, 2 Wood. & M. 246.)

At law.—An amendment cannot be allowed to change the form of action (**Schoolfield v. Fitzhugh**, 1 Cranch C. C. 108; but see **The Harmony**, 1 Gall. 123.) A declaration in ejectment may be amended by inserting a later date of the lease. (**Walden v. Craig**, 9 Wheat. 576; **Blackwell v. Patton**, 7 Cranch, 471.) The state of the demise may be amended (**Blackwell v. Patton**, 7 Cranch, 471; **Smith v. Vaughan**, 10 Peters, 367; **McDaniel v. Wailes**, 4 Cranch C. C. 201; see **Day v. Chusan**, 10 Wheat. 449); and it may be extended after judgment, but not except on notice.

(*Ledgerwood v. Pickett*, 1 McLean, 143.) Stating it under a new title will not be allowed. (*Gale v. Babcock*, 4 Wash. C. C. 199.) If judgment in ejectment is rendered after the lapse of the terms stated in the demise, it may be amended by enlarging the term. (*Walden v. Craig*, 9 Wheat. 576.) In slander an amendment may be allowed changing the words charged (*Dougherty v. Bartley*, 1 Cranch C. C. 219); and in libel an answer was allowed to be amended by inserting denials in respect to the amount of damages. (*Goodyear D. V. Co. v. White*, 8 Reporter, 423.) A libel or information at common law to enforce a forfeiture may be amended. (*U. S. v. Stevenson*, 6 Int. Rev. Rec. 221; *U. S. v. Batchelder*, 9 Int. Rev. Rec. 98; *U. S. v. Barrels*, 3 Int. Rev. Rec. 114; *U. S. v. Whisky*, 7 Phila. 603; *U. S. v. Casks*, 1 Abb. U. S. 573; *Anon.*, 1 Gall. 22.) So a petition on a court of claims may be amended. (*Molina v. U. S.*, 6 Ct. of Cl. 269.) When the jury find larger damages than are laid in the declaration, and plaintiff asks to amend, defendant is entitled to a new trial and to costs. (*Etting v. Campbell*, 5 Blatchf. 183.)

In equity.—Amendments in mere matters of form, dates, or verbal inaccuracies, are liberally allowed. (*Smith v. Babcock*, 3 Sum. 583.) The court has power in the interest of justice to permit an amendment to defective pleadings, both of bills and answers. (*Neale v. Neales*, 9 Wall. 1; *Foote v. Silsby*, 1 Blatchf. 545; *Battle v. Mut. L. Ins. Co.*, 10 Blatchf. 47; *Caster v. Woods*, Bald. 289.) A bill may be amended by making new parties (*Fisher v. Rutherford*, Bald. 188); or by adding an averment of citizenship (*Fisher v. Rutherford*, Bald. 188; *Keene v. Wheatley*, 4 Phila. 157); even after interlocutory decree on demurrer (*Fisher v. Rutherford*, Bald. 188; *Hilliard v. Brevoort*, 4 McLean, 24; *Spofford v. Ritten*, 4 McLean, 253); and even after remand from the supreme court (*Jackson v. Ashton*, 10 Pet. 480); or by striking out an invitation to other creditors to come in at any time before answer. (*Yates v. Arden*, 5 Cranch C. C. 526.) So a bill may be amended by adding a prayer for relief. (*Horsburg v. Baker*, 1 Pet. 232.) It may be amended so as to conform its special prayer to its real purpose. (*Partee v.*

Thomas, 11 Fed. Rep. 772; see *Estill v. Deckard*, 4 Baxt. 497.) So if the facts authorize a redemption from a creditor's sale, though the period for redemption is past, the court will permit an amendment to the prayer for relief. (*Burgess v. Graffam*, 10 Fed. Rep. 216.) If the amendment introduces a new case, defendant may plead in abatement or otherwise. (*Keene v. Wheatley*, 4 Phila. 157.) When due diligence is shown, the bill may be amended, even though the claim is stale. (*Wharton v. Lowrey*, 2 Dall. 364; *Fisher v. Rutherford*, Bald. 188; *Copen v. Flesher*, 1 Bond, 440.) Where a new cause of action is intended by an amendment, it may be allowed when it corresponds with the original bill (*U. S. v. Distilled Spirits*, 1 Abb. U. S. 573); but not when it introduces a new cause of action (*The Circassian*, 2 Ben. 171; see *Walden v. Bodley*, 14 Pet. 156); but an amendment which changed the character of the bill was allowed in a special case, even after final decree. (*The Tremolo Patent*, 23 Wall. 518.) Where the original petition was lost, the court may allow the filing of a new petition. (*Phillips v. Moore*, 100 U. S. 208.) The amended bill should state so much of the original bill as is necessary. (*Pierce v. West*, 3 Wash. C. C. 354.) An amendment relates back to the filing of the original bill, and is incorporated into and is a part of it. (*Gaylord v. Fox W. M. & C. R. Co.*, 6 Biss. 286.) An amendment was allowed where it was clear the cause was tried as it must have been tried had the bill been originally drawn as amended. (*Tremaine v. Hitchcock*, 23 Wall. 518.) On a motion made before final argument, leave may be granted to amend an answer, so as to set up a new defense. (*Snow v. Tapley*, 13 Off. Gaz. 548.) An application to reform an answer is more favorably received than one to strike it off and substitute another. (*Caste v. Wood*, Bald. 289.) In a particular case an amendment was allowed so as to deny the validity of a patent (*Morehead v. Jones*, 3 Wall. Jr. 356); and an amendment in an answer, on the ground of mistake or error in the admission of an infringement, was denied. (*Ruggles v. Eddy*, 11 Blatchf. 524.) An amendment will not make evidence admissible which was taken under objections before admission. (*Roberts v. Buck*, 6 Fish. 325.) A motion to amend by adding new parties

defendant after replication where plaintiff was in a position to make the amendment before will not be allowed. (Clifford v. Coleman, 13 Blackf. 210; see Gaylord v. Fort Wayne & Co., 6 Biss. 286.) A bill not framed with a view to compel the receiver and back tax collector to proceed with the collection of taxes cannot be amended so as to obtain relief against such collector. (Meriwether v. Garrett, 102 U. S. 472.) An amendment to an answer cannot be made after an interlocutory decree. (Wilson v. Turberville, 2 Cranch C. C. 27.) In equity the party amending may be required to pay costs. (Foote v. Silsby, 1 Blatchf. 545; Yates v. Arden, 5 Cranch C. C. 526; Davis v. Leslie, 1 Abb. Adm. 123.) A motion to amend by averment on information and belief that the invention was in public use more than two years, denied. (Webster Loom Co. v. Higgings, 13 Blatchf. 349, 954.)

In admiralty.—A libel or information to enforce a forfeiture may be amended (The Caroline, 7 Cranch, 498; The Edward, 1 Wheat. 261); or a libel *in rem* for violation of a municipal law (The Marianna Flora, 11 Wheat. 1; Anon., 1 Gall. 22); and in case of smuggling, an amendment is allowed, to show that a foreign owned vessel is liable to penalty for the infraction of duty laws. (U. S. v. The Queen, 4 Ben. 237.) An informal libel or information *in rem* may be amended by leave of court. (The Caroline, 7 Cranch, 498.) A libel in admiralty may be amended as to parties (The Commander-in-Chief, 1 Wall. 43), by striking out names of libelants (Taylor v. Harwood, Taney, 437); as the name of the pilot (Newell v. Norton, 3 Wall. 257); or by discharging the master (The Queen, 11 Blatchf. 416); but it cannot be amended by striking out the name of the sole libelant and substituting another. (The Detroit, 1 Brown Adm. 141.) It may be amended by striking out unnecessary and impertinent allegations (Amer. Ins. Co. v. Johnson, Blatchf. & H. 9), or immaterial averments as to ownership (U. S. v. The Queen, 4 Ben. 237); or by adding new allegations (The Edward, 1 Wheat. 261), or a new cause of forfeiture (U. S. v. W., 7 Phila. 603); but not if barred by the statute of limitations (U. S. v. Casks, 1 Abb. U. S. 573; The Harmony, 1 Gall. 123); or averments, as of negligence

(The Deer, 4 Ben. 352); or an averment that it is prosecuted for all interested who may come in and establish their rights. (Amer. Ins. Co. v. Johnson, Blatchf. & H. 9.) An amendment will be allowed to enable a party to obtain a contribution out of damages due for the loss of the vessel. (The C. H. Foster, 1 Fed. Rep. 733.) A new cause of action may be introduced by amendment when it corresponds with the original bill (U. S. v. Dist. Spirits, 1 Abb. U. S. 573); but it cannot be amended so as to change from a libel *in rem* to a libel *in personam* (The Young America, 1 Brown Adm. 463), or so as to increase the amount of the claim (Agnew v. Dorman, Taney, 300), nor to show that a party was formerly owner, and sold with a covenant to discharge all liens. (The Prindville, 1 Brown Adm. 485.) It may be amended by inserting a prayer for a decree against a party liable, even after a decree *in rem* has been rendered. (The Zenobia, Abb. Adm. 48.) An amendment to an answer will be allowed, though the effect be to defeat the action and compel libellant to seek another forum. (Reppert v. Robinson, Tancy, 492.) A supplemental libel alleging new matter, and an answer thereto, may be filed after appeal in the discretion of the court. (U. S. v. Dist. Spirits, 1 Abb. U. S. 372.) District courts, in the exercise of a sound discretion, may allow libels to be amended, even at the hearing (Davis v. Leslie, Abb. Adm. 123; The William Penn, 3 Wash. C. C. 484); or at any stage of the proceedings (The Hunter, 1 Ware, 249; Pettingill v. Dinsmore, 2 Ware, 212; Nevitt v. Clarke, Olcott, 316; The Deer, 4 Ben. 352; The St. John, 7 Blatchf. 220), till the termination of the cause (The Edwin Post, 6 Fed. Rep. 206), in the interest of substantial justice. (Pettingill v. Dinsmore, 2 Ware, 212; Anon., 1 Gall. 22.) It may be amended in the circuit court (The Sarah Ann, 2 Sum. 206; The Morton, 1 Brown Adm. 137); and a defect in the signature will not be regarded if it appears it was verified (Hardy v. Moore, 4 Fed. Rep. 843); it may be allowed without waiting for the disposition of the exceptions thereto. (The Western Metropolis, 28 How. Pr. 283.) A supplemental libel and an answer thereto may be filed after appeal. (The Boston, 1 Sum. 328; Lamb v. Parkman, 21 Law Rep. 589.) So in collision cases (The Pennsylvania, 12 Blatchf. 67), and after re-

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versal where there is a want of a substantial averment (The Anne v. U. S., 7 Cranch, 570); or even after the case has been remanded from the supreme court (The Caroline v. U. S., 7 Cranch, 496; The Anne, 7 Cranch, 570; The Mary Ann, 8 Wheat. 380); but an amendment in an admiralty case before the court of appeals cannot introduce a new subject of controversy. (Houseman v. The North Carolina, 15 Peters, 40.)

In bankruptcy cases.—The court will allow formal amendments to be made to the schedule where there were omissions inadvertently made (In re Hill, 5 Fed. Rep. 448), in order that proper returns may be made. (In re Townsend, 2 Fed. Rep. 559.) So it has authority to amend an order of sale by making the sale subject to the payment of a legacy out of the purchase-money of the property sold (In re McGonigle, 2 Fed. Rep. 768); but amendments will not generally be allowed for the purpose of setting up the statute of limitations to defeat claims otherwise equitable and just. (In re Bear, 8 Fed. Rep. 428.)

Amendment on removal.—This section, both in letter and spirit, confers the power and makes it the duty of courts to cure defects in the record by enlarging the time for filing a transcript on the removal of a cause from a state court. (Woolridge v. McKenna, 8 Fed. Rep. 663.) So an amended transcript may be filed disclosing the requisite citizenship. (Kaeizer v. Illinois Cent. R. R. Co., 6 Fed. Rep. 1; 2 McCrary, 187.) So the declaration may be amended by inserting new counts for the same cause of action. (West v. Smith, 101 U. S. 263.)

Amendment of verdict.—The words "or course of proceeding whatever" are broad enough to include verdicts (Parks v. Turner, 12 How. 39); so if a verdict is general, it may be amended so as to apply to the count under which the evidence is given. (Matheson v. Grant, 2 How. 263; Stockton v. Bishop, 4 How. 155.) Leave may be granted to amend a verdict in replevin after the jury had returned and another cause had been tried. (Argueles v. Wood, 2 Cranch C. C. 579.) A verdict in *assumpsit* "that defendant is guilty in manner and form as alleged" is

amendable. (Lincoln v. Iron Co., 103 U. S. 412.) On a stipulation that the jury, if the court be not in session when they agree upon their verdict, may sign, seal, and deliver it to the officer in charge and disperse, the entry of the verdict in proper form is allowed by this section. (Koon v. Ins. Co., 104 U. S. 106; S. C., 3 Morr. Trans. 125.) The court may enter the verdict in such form as to give legal effect to what the jury unmistakably found, under Rev. Stat., sec. 954, and the Practice Act of Illinois. (Koon v. Phoenix Mut. L. Ins. Co., 104 U. S. 106.)

Amendments after verdict.—A defective pleading may be cured after verdict (Garland v. Davis, 4 How. 131; Clark v. Sohler, 1 Wood. & M. 368); and the rule that a defective statement of a good cause of action is cured by the verdict extends to penal actions (Smith v. U. S., 1 Gall. 261.) All circumstances necessary in form or in substance to make out a cause of action, though imperfectly stated, must be proved at the trial; hence the defect is cured by the verdict (Pearson v. Bank, 1 Peters, 89; Matheson v. Grant, 2 How. 263; Stockton v. Bishop, 4 How. 155; De Salry v. Nicholson, 3 Wall. 420; Corcoran v. Dougherty, 4 Cranch C. C. 205; Scull v. Higgins, Hemp. 90; Stanley v. Whipple, 2 McLean, 35; Kemble v. Lull, 3 McLean, 272; Gray v. James, Peters C. C. 476; Dobson v. Campbell, 1 Sum. 319); as an allegation under a *videlicet* (Ingel v. Collard, 1 Cranch C. C. 152; Woodward v. Brown, 13 Peters, 1); or the omission to join a party as plaintiff who ought to have been joined (Greenleaf v. Schell, 6 Blatchf. 225); or to give the time when the injury was done (Stockton v. Bishop, 4 How. 155); or to aver the value of the foreign money in an action on a bill of exchange (Brown v. Barry, 3 Dall. 265), as a declaration in debt is in the *debet* as well as the *detinet* (Brown v. Barry, 3 Dall. 208; Gardiner v. Lindo, 1 Cranch C. C. 78); but if it omits to show matters essential to the jurisdiction (Smith v. Allyn, 1 Paine, 486), or to state a cause of action, it is not cured by the verdict (Smith v. Allyn, 1 Paine, 486; Renner v. Bank, 9 Wheat. 581; McDonald v. Hobson, 7 How. 745; Washington v. Ogden, 1 Black. 450); or if a libel *in rem* does not show the commission of an offense. (See The Virgin, Peters C. C. 7.) An alterna-

tive allegation in an action of debt for a penalty can only be objected to by a demurrer, and is cured by a verdict. (Jacobi v. U. S., 1 Brock. 520.) An objection that the declaration does not make proof of letters of administration cannot be taken after verdict. (Gardner v. Lindo, 1 Cranch C. C. 78; Matheson v. Grant, 2 How. 263.) If a declaration merely assigns the non-payment of the penal sum on a bond, an omission to assign a special breach of the condition, in a replication to a plea of performance, is cured by a verdict. (Minor v. Mechanics' Bank, 1 Peters, 46.) A verdict will cure a discontinuance caused by the failure of the executor to appear within the proper time after suggestion of the death of the plaintiff (Brent v. Coyle, 2 Cranch C. C. 287.) An allegation under a *videlicet* may be disregarded. If the breach alleged is not a breach of the covenant, error is not cured by verdict. (Ingle v. Collard, 1 Cranch C. C. 152.) A plea of *non assumpsit*, in an action on the case, is not cured by a verdict. (Garland v. Davis, 4 How. 131. Where two pleas present substantially the same issue, the fact that an immaterial issue is joined on the replication to one plea is no reason for arresting a judgment and awarding a repleader (Ersine v. Hornbach, 14 Wall. 613; Pegram v. U. S., 1 Brock. 261); so if plaintiff replies to only one. (Laber v. Cooper, 7 Wall. 565.) Although a decision sustaining a demurrer to a plea is erroneous, yet if the defense can be presented under another plea filed, the judgment will be good. (Junction R. Co. v. Bank, 12 Wall. 226.) Where there is a defect in a pleading, yet if the issue be such as required proof of the facts so defectively stated or omitted, and without which it is not to be presumed the judge would have directed a verdict, such defect is cured. (Lincoln Township v. Cambria Iron Co., 103 U. S. 415.) A variance between the writ and the declaration as to the return day is amendable. (Wilder v. McCormick, 2 Blatchf. 31.)

Judgments and decrees.—All judgments, decrees, or orders are under control of the court which pronounces them during the term at which they are rendered, and may be set aside, vacated, or modified. (Bronson v. Schulten, 100 U. S. 410.) But amendments to judgments or decrees cannot be made except as to formal defects (Albers

v. Whitney, 1 Story, 310), where the entry was erroneously made (U. S. v. Bennett, Hoff. 281), or where there is a verbal mistake of the clerk in using a superfluity of words in entering judgment (Shaw v. Railroad Co., 101 U. S. 557; Barnes v. Lee, 1 Cranch C. C. 471); or where, by a misprision of the clerk, the judgment had not been entered according to the declaration (Woodward v. Brown, 13 Peters, 1); or where the clerk had omitted to enter judgment allowing interest (Bank v. Wistar, 3 Peters, 431); or if a judgment by confession is entered without declaration or rule to plead (Ault v. Elliott, 2 Cranch C. C. 372); or if made by only one of several joint defendants (Hyler v. Hyatt, 2 Cranch C. C. 633; Newton v. Weaver, 2 Cranch C. C. 685; see Ringgold v. Elliott, 2 Cranch C. C. 462); or if entered in a wrong case (Pierce v. Turner, 1 Cranch C. C. 433); or if made by an attorney by mistake. (Bank v. McKinney, 3 Cranch C. C. 173.) A judgment may be amended by striking out a part which the court has no authority to make (The Hiram Wood, 6 Chic. L. N. 135); or where it was entered by mistake (U. S. v. Fearson, 5 Cranch C. C. 95); any clerical error may be corrected after the lapse of the term (Scott v. Blaine, Bald. 287; Brush v. Robbins, 3 McLean, 486); as by making it payable in gold or silver coin. (Cheang Kee v. U. S., 3 Wall. 320.) A judgment or decree cannot be stricken out after the lapse of the term at which it is rendered (Brush v. Robbins, 3 McLean, 486; Wood v. Luse, 4 McLean, 254; Scott v. Blaine, Bald. 287); but if irregularly entered it may be set aside (Union Bank v. Crittenden, 2 Cranch C. C. 238); or for a mistake in the assessment of damages (Crooks v. Maxwell, 6 Blatchf. 468); or if considered as a nullity. (Wood v. Luse, 4 McLean, 254; Harris v. Hardeman, 14 How. 334.) Though the court cannot change the essential parts of a decree after the term at which it is entered, yet it may subsequently amend the decree as to the mode of execution, manner of sale, time of publication, and distribution of proceeds (Turner v. I. B. & W. R. Co., 8 Biss. 380); but an interlocutory decree is always open to amendment and correction. (De Flovez v. Reynolds, 8 Fed. Rep. 434; 17 Blatchf. 436.)

On error or appeal.—An amendment may be made in the appellate tribunal by agreement of parties (*Fletcher v. Peck*, 6 Cranch, 137; *Mathewson v. Grant*, 2 How. 263; *Anonymous*, 1 Gall. 25; *Kennedy v. Bank*, 8 Wall. 586); but not so as to introduce a new controversy. (*The North Carolina*, 15 Peters, 50; *The John Jay*, 3 Blatchf. 68.) So if the record does not contain the proper allegation of citizenship it may be amended. (*Kennedy v. Bank*, 8 How. 607.) On reversing a judgment the appellate court will not direct the lower court to allow the proceedings to be amended (*Sheehy v. Mandeville*, 6 Cranch, 267, note); so as to the allowance of a repleader; but it may remand the cause that the pleading may be amended. (*Garland v. Davis*, 4 How. 53.) The power over mere matters of form extends to the appellate court, where the defects are not to be regarded as matters of error (*Smith v. Allyn*, 1 Paine, 456), such defects being disregarded (*Stockton v. Bishop*, 4 How. 155); so of an immaterial allegation under a *videlicet* (*Sternham v. U. S.*, 2 Paine, 168; *U. S. v. Burnham*, 1 Mason, 57); or where there is a formal submission (*Bank v. Guttschlick*, 14 Peters, 19); or a defective name (*Chittenden v. Davis*, Hemp. 96; *Conrad v. Guffy*, 11 How. 480); or a variance between averments and findings (*Railroad Co. v. Lindsay*, 4 Wall. 650); or an error on trying issues out of their order (*Townsend v. Jemison*, 7 How. 706; *Morsell v. Hall*, 13 How. 212); or a formal defect in the verdict if it is otherwise sufficient to sustain the judgment (*Downey v. Hicks*, 14 How. 240); or a general verdict on distinct issues (*Roach v. Hulings*, 16 Peters, 319); or where the verdict and judgment are only on one demise out of several. (*Van Ness v. Bank*, 13 Peters, 17.) So if a declaration contains a special count, and the common counts, judgment may be sustained on the common counts (*Bank v. Moss*, 6 How. 31); or where there is an omission to join issue on one out of two avowals in replevin (*Dermott v. Wallach*, 1 Black, 96); or where there is an omission of a *similiter* (*Dermott v. Wallach*, 1 Black, 90); or the omission to obtain leave to file an amended bill, or to file a replication. (*Clements v. Moore*, 6 Wall. 299.) An omission on an appeal does not require the dismissal of the appeal, but the court may aid the appeal on terms. (*Dayton v. Lash*, 94 U. S. 112;

see *Vansant v. Gas Light Co.*, 99 U. S. 213.) A party will be allowed to enter his *remittitur* in the supreme court in furtherance of justice, where it appears that one of the bills sued on had been omitted to be described in the original declaration. The appellate court may correct an error in striking out defendant's pleading which constitutes a ground of defense (*Hozey v. Buchanan*, 16 Peters, 215); or may permit the addition of counts under the statute in an action for a forfeiture (U. S. v. *Whiskey*, 11 Int. Rev. Rec. 109); or allow amendments so as to let in new evidence or grounds of defense in the circuit court in an admiralty case. (*Reppert v. Robinson*, Taney, 492.) The appellate court may allow an amendment, although it concludes against the form of the statute in an offense created by a single statute. (*Kenricks v. U. S.*, 1 Gall. 268.) After a writ of error the court will not grant leave to amend in a matter of substance. (*Marsteller v. McClean*, 2 Cranch C. C. 8.) If a declaration in debt for a penalty does not conclude against the form of the statute, it is bad on writ of error. (*Smith v. U. S.*, 1 Gall. 261.) The court will not set aside at a subsequent term the order of dismissal, and grant leave to file the record, and docket the case. (*Selma & Mer. R. R. Co. v. Louisiana Nat. Bk.*, 94 U. S. 253.) So the court denied the allowance of an amendment making a new party where the question made by the assignment of error had been settled by repeated decisions. (*Pearson v. Yawdell*, 95 U. S. 294.) The court refuses to consider an amended bill which does not appear to have been filed by leave of court. (*Terry v. McLure*, 103 U. S. 442; *Godfrey v. Terry*, 97 U. S. 171.) If a party omitted to file a replication in a special plea, he may be allowed to file it *nunc pro tunc*, although the case is on appeal. (*Wilcox v. U. S.*, 6 Ct. of Cl. 78.)

Amendment of record.—A clerical error in any part of the record may be amended (*Evans v. Glenn*, 1 Colo. 454; *Cobb v. Howard*, 10 N. Y. Leg. Obs. 353), even after lapse of the term (*Evans v. Glenn*, 1 Colo. 454); as a mistake in entering verdict on the merits (*Tomes v. Redfield*, 7 Blatchf. 139); or on entering judgment (*Crownwell v. Bank*, 2 Wall. Jr. 570; *Coelle v. Lockhead*, Hemp. 194); or the omission to enter an order (U. S. v. *Smith*, 1 Cranch

C. C. 127); as for a *mandamus* (Supervisors v. Durant, 9 Wall. 736); or the allowance of time to file exceptions. (Doane v. Glenn, 1 Colo. 454.) A mistake in an entry or a misprision may be stricken out at a subsequent term (Sheppard v. Wilson, 6 How. 260); but a mistake in the docket that the judgment is for the use of another cannot be stricken out after lapse of the term. (Bradley v. Eliot, 5 Cranch C. C. 293.) A mistake in the name of defendant in a commission may be amended (Boone v. Janney, 2 Cranch C. C. 312); but a mistake in the name of the plaintiff cannot be amended where the record shows matter by which it can be amended. (Albers v. Whitney, 1 Story, 310.) Inserting a wrong title on a commission may be amended (Keener v. Meade, 3 Peters, 1); or a defect in an affidavit to an account filed with the declaration. (Tilley v. Thorp, 2 Cranch C. C. 290.) If important to give consistency to the minutes and render the ultimate action of the court correct, amendments may be allowed. (Amer. Ins. etc. Co. v. Johnson, Blatchf. & H. 9; The Martha, Blatchf. & H. 151; Nevitt v. Clarke, Olcott, 316.) A material amendment of the record cannot be made after writ of error brought. (U. S. v. Hooe, 1 Cranch C. C. 116.) A writ of error is amendable (Course v. Stead, 4 Dall. 22), by filing a blank left for the return day. (Mossman v. Higginson, 4 Dall. 12.) So a clerical mistake may be amended by the citation. (McVeigh v. U. S., 8 Wall. 640.) A bill of exceptions may be amended during the term. (Walton v. U. S., 9 Wheat. 651.)

§ 479. Death of parties.—When either of the parties, whether plaintiff, petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render judgment for or against

the administrator or administrator, as the case may require. And if such executor or administrator, having been duly served with a *scire facias* from the office of the clerk of the court where the suit is depending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court. (Rev. Stats., sec. 955.)

§ 480. Revivor on death of party.—That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment, and thereupon may enter an appeal or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the supreme court, as provided in case of the death of a party after appeal taken or writ of

error brought. (18 U. S. Stats. 473; 1 Sup. Rev. Stats. 177.)

Revivor on death of party.—The common-law rule that *qui tam* actions on penal statutes do not survive prevails in the federal courts as to actions on penal statutes of the United States, even in states where the statutes of the state allow suits on state penal statutes after the death of the offender. (Schreiber v. Sharpless, 110 U. S. 76.) The survivability of a right of action is governed by the local law. (Warren v. Furstenheim, 35 Fed. Rep. 691.) In case of injuries causing death a right of action survives. (Rev. Stats., secs. 5225, 5226; St. Louis etc. R. Co. v. McBride, 141 U. S. 127.)

Revival of suit.—This section saves every action from abatement by death of the parties where the cause of action survives, and the survival of the cause must depend on the local law. (Trigg v. Conway, Hemp. 711; Hatfield v. Bushnell, 1 Blatchf. 393.) It is confined to personal actions, as the power to prosecute or defend is not given to the heir or devisee; so a real action abates by death, and cannot be revived against the heir. (Green v. Watkins, 6 Wheat. 260; Macker v. Thomas, 7 Wheat. 530.) The revivor of the suit by or against the representative of deceased is a matter of right, and is a mere continuation of the original suit, without distinction as to citizenship of such representative (Clarke v. Mathewson, 12 Fed. 164); but this section does not relate to or affect suits in admiralty. (The James A. Wright, 10 Blatchf. 160; but see The Norway, 1 Ben. 493.) The mode of continuing a suit in the name of the executor or administrator is a substitute for the continuance by Journey's account. (Richards v. Md. Ins. Co., 8 Cranch, 84.) If complainant died before entry of decree from which an appeal was taken, it is no ground for abating the suit after return of the mandate. (Story v. Livingston, 13 Pet. 359.) In all cases of the death of a party before final judgment, the proceedings are to be exactly as if the executor or administrator were a voluntary party to the suit. (Hatch v. Eustis, 1 Gall. 160.) He may be made

a party on his own motion without issuing a *scire facias* (Wilson v. Codman, 3 Cranch, 193; Griswold v. Hill, 1 Paine, 483); but he must show that he is executor, and produce his letters testamentary if required by the adverse party. (Wilson v. Codman, 3 Cranch, 193.) If he voluntarily makes himself a party, the adverse party is not entitled to a continuance. (Wilson v. Codman, 3 Cranch, 193; Griswold v. Hill, 1 Paine, 483.) The appearance of the heir under the rule to show cause why a real action should not be revived against him will not cure the error of such revivor. (Macker v. Thomas, 7 Wheat. 530.) Upon a bill to revive, the sole questions are as to the competency of the parties and the correctness of the frame of the bill. (Bettes v. Dana, 2 Sum. 383.) It cannot be brought against an administrator of a defendant who neither appeared nor was served with process (U. S. v. Fields, 4 Blatchf. 326), nor against one in a state other than that from which their authority proceeds. (Malus v. Thompson, 1 Cliff. 125.) The abatement of a *scire facias* in the name of a *feme sole* as administratrix who afterwards marries is no bar to a *scire facias* in the name of husband and wife. (McCoul v. Lekamp, 2 Wheat. 111.)

§ 481. When one of several plaintiffs or defendants dies.—If there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant. (Rev. Stats., sec. 956.)

§ 482. Delinquents for public money.—When suit is brought by the United States against any revenue officer or other person ac-

countable for public money, who neglects or refuses to pay into the treasury the sum or balance reported to be due to the United States, upon the adjustment of his account it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the treasury, and rejected, specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed, and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper certified in the affidavit. And no continuance shall be granted except as herein provided. (Rev. Stats., sec. 957.)

Note.—A judgment cannot be prevented at the return term by a continuance under oath claiming credits, unless they were disallowed before commencement of the suit. (U. S. v. Hawkins, 10 Pet. 125.) An officer against whom summary proceedings are instituted may set off the fees for services to government rendered by him. (U. S. v. Mann, 2 Brock. 1.)

§ 483. Judgment for suits under postal laws.—In suits arising under the postal laws the court shall proceed to trial, and render judgment at the return term; but whenever service of process is not made at least twenty days before the return day of such term, the defendant is entitled to one continuance, if, on his statement, the court deems it expedient; and if he makes affidavit that he has a claim against the post-office department, which has been submitted to and disallowed by the sixth auditor, specifying such claim in his affidavit, and that he could not be prepared for trial at such term for want of evidence, the court, if satisfied thereof, may grant a continuance until the next term. (Rev. Stats., sec. 958.)

§ 484. Judgment for suits on debentures.—In all suits for the recovery of money upon debentures issued by the collectors of customs, under any act for the collection of duties, it shall be the duty of the court to grant judgment at the return term, unless the defendant, in open court, exhibits some plea, on oath, by which the court is satisfied that a continuance is necessary to the attainment of justice; in which case, and not otherwise, a continuance until the next term may be granted. (Rev. Stats., sec. 959.)

§ 485. Suits on bonds for recovery of duties.—When suit is brought on any bond for the recovery of duties due to the United

States, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States attorney being present), makes oath that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district before the said return term; whereupon a continuance may be granted until the next term, and no longer, if the court is satisfied that such continuance is necessary for the attainment of justice. (Rev. Stats., sec. 960.)

Note.—Where there is a real defense an opportunity to obtain evidence by a continuance must be given. (U. S. v. Phelps, 8 Peters, 700.)

§ 486. Judgment for sum due in equity on bonds, etc.—In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury. (Rev. Stats., sec. 961.)

Note.—This section is confined to cases of default, con-

fession, and demurrer (*Farrar v. U. S.*, 5 Peters, 373), and does not apply to cases heard on agreed facts. (*Ives v. The Merchants' Bank*, 12 How. 159.) Where damages exceed the penalty of the bonds, judgment should be for the penalty only. (*Farrar v. U. S.*, 5 Peters, 573.)

§ 487. Judgment for duties, etc.—In all suits by the United States for the recovery of duties upon imports, or of penalties for the non-payment thereof, the judgment shall recite that it is rendered for duties, and such judgment, with interest thereon, and costs, shall be payable in the coin by law receivable for duties; and the execution issued thereon shall set forth that the recovery is for duties, and shall require the marshal to satisfy the same in the coin by law receivable for duties; and in case of levy upon and sale of the property of the judgment debtor, the marshal shall refuse payment from any purchaser at such sale in any other money than that specified in the execution. [See sec. 3014.] (*Rev. Stats.*, sec. 962.)

§ 488. Interest on bonds for duties.—Upon all bonds, on which suits are brought for the recovery of duties, interest shall be allowed, at the rate of six per centum a year, from the time when said bonds became due. (*Rev. Stats.*, sec. 963.)

§ 489. Interest on balances due post-office department.—In all suits for balances due to the post-office department, interest there-

on shall be recovered, from the time of the default, at the rate of six per centum a year. (Rev. Stats., sec. 964.)

§ 490. **Interest on debentures.**—In suits upon debentures, issued by the collectors of the customs under any act for the collection of duties, interest shall be allowed, at the rate of six per centum per annum, from the time when such debenture became due and payable. (Rev. Stats., sec. 965.)

§ 491. **Interest on judgments.**—Interest shall be allowed on all judgments in civil causes, recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the state in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such state; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such state. (Rev. Stats., sec. 966.)

Interest.—This section does not embrace cases in equity nor judgments or decrees of the supreme court. (Perkins v. Tourniquet, 14 How. 328.) It does not apply to judgments against the United States. (U. S. v. Sherman, 98 U. S. 565.) The interest on decrees is the same as that in the state courts. (Railroad Co. v. Turrill, 101 U. S. 836.) A judgment bears interest by force of law, although it may not purport to carry interest. (Perkins v. Tourniquet, 14 How. 328.) The liability of defendant is not

only for the amount of the judgment, but for interest on it. (*White v. Arthur*, 10 Fed. Rep. 83; 20 Blatchf. 237.) This section does not exclude the idea of a power in the state to allow interest on verdicts; it is a right of which the successful plaintiff cannot be deprived by removal of his case to a federal court. (*Massachusetts Ben. Ass'n v. Miles*, 137 U. S. 689.) Where judgment was entered generally for no definite sum, and the amount actually, with interest, exceeded five thousand dollars, this court has jurisdiction. (*Massachusetts Ben. Ass'n v. Miles*, 137 U. S. 689.)

§ 492. Judgments—Lien and record of.
—That judgments and decrees rendered in a circuit or district court of the United States within any state shall be liens on property throughout such state, in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such state; *provided*, that whenever the laws of any state require a judgment or decree of a state court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county or parish in the state of Louisiana before a lien shall attach, this act shall be applicable therein whenever, and only whenever, the laws of such state shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the state. (25 U. S. Stats. 357, sec. 1.)

§ 493. Record in Louisiana. — Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any state office within the same county or parish in the state of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county. (25 U. S. Stats. 357, sec. 3.)

§ 494. Effect of judgments in California. — The passage of this act, to "Create the United States judicial district of Southern California," shall not have the effect to destroy or impair the lien of any judgment or decree rendered in the circuit or district court of the United States for the present district of California prior to this act taking effect; and final process on any judgment or decree entered in the circuit or district court of the United States for the district of California, or which shall be entered therein prior to this act taking effect, and all other process for the enforcement of any order of said courts, respectively, in any cause or proceeding now pending therein except on proceedings removed as herein provided, shall be issued and made returnable to the proper court for the said northern district of California, and may be directed to and executed by the marshal of the United States for the said northern district in any part of the state of California. (24 U. S. Stats. 308.)

§ 495. **Judgments—Limitations.**—Judgments and decrees rendered in a circuit or district court, within any state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens thereon. (Rev. Stats., sec. 967.)

Judgment liens.—A state law which provides that a judgment shall not be a lien unless execution be issued thereon within a certain time applies to federal courts (Sellers v. Corwin, 5 Ohio, 398); but a state law which allows a suspension of the lien on giving security on appeal (Myers v. Tyson, 13 Blatchf. 242), or which provides that a judgment shall not be a lien except it be docketed in the county where the land lies, does not apply to the federal courts. (U. S. v. Humphreys, 3 Hughes, 201.) The same proceedings which in a state court creates a lien in the county where judgment is entered creates it in the circuit court to the extent of its jurisdiction. (Massingill v. Downs, 7 How. 760.) The pendency of a writ of error does not affect the duration of the lien. (Chouteau v. Nuckolls, 20 Mo. 442.) The duration of a judgment lien in a federal court is the same as that of judgments in a state court. (Chouteau v. Nuckolls, 20 Mo. 442.) Although land is sold under judgment of a state court, if the lien of judgments of the federal court is allowed to expire before the sales, the first purchaser obtains the elder legal title. (Chouteau v. Nuckolls, 20 Mo. 442.) A state law cannot have a retrospective effect, so as to impair a judgment lien of the federal court. (Massingill v. Downs, 7 How. 760; *contra*, Tarpley v. Hamer, 17 Miss. 310.) As to district courts, "decrees" in this section apply to decrees in admiralty for the payment of money. (Ward v. Chamberlain, 2 Black. 430.) Sale of property under execution exhausts the lien of the judgment as to subsequent mortgage; and redemption by the subsequent lien-holder does not restore the lien of the judgment. (Porter v. Pittsburg Bessemer Steel Co., 122 U. S. 267.) The Indiana statute

authorizes redemption of railroad property from sale under execution. (Id.)

§ 496. **Recovery of costs.**—When, in a circuit court, a plaintiff in an action at law originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value, or a libellant, upon his own appeal, recovers less than the sum or value of three hundred dollars, exclusive of costs, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs. (Rev. Stats., sec. 968.)

Costs.—This section applies to cases arising under the constitution and laws of the United States as well as cases at common law. (*Kneass v. Schuylkill Bank*, 4 Wash. C. C. 106.) If a plaintiff recover less than five hundred dollars he cannot recover costs (*Kneass v. Schuylkill Bank*, 4 Wash. C. C. 106; *Leeds v. Cameron*, 3 Sum. 488; *Curran v. McQueen*, 2 Paine, 109); so if the value of land recovered is less than five hundred dollars (*Green v. Liter*, 8 Cranch, 239); but otherwise in a case removed from the state court, if he would have been entitled to costs in such court (*Field v. Schell*, 4 Blatchf. 435; *Kreager v. Judd*, 5 Fed. Rep. 27; *Ellis v. Jarvis*, 3 Mason, 457; *Scripps v. Campbell*, 22 Int. Rev. Rec. 250; *Coggill v. Lawrence*, 2 Blatchf. 301.) The act of Congress of March 3, 1887, raising the minimum amount required to give jurisdiction to a circuit court of the United States, does not by implication raise to the same limit the amount of recovery necessary to carry costs in favor of plaintiff, but a recovery of five hundred dollars is still sufficient under this section. (*Johuson v. Watkins*, 40 Fed. Rep. 187.) This section

was not amended by the act of 1887. (*Eastman v. Sherry*, 37 Fed. Rep. 844; followed in *Johnson v. Watkins*, 40 Fed. Rep. 187.) In a suit against three railroad companies, it is too late after judgment to make the objection that the suits should have been separately brought, or to escape costs caused by defendant's act in separating the verdict and judgment for their own benefit, under Thompson's Code (Tenn.), secs. 2973-2975. Section 968, *supra*, does not apply to such a case. (*Johnson v. Mississippi & T. R. Co.*, 31 Fed. Rep. 551.) This section changes the rule established by the statute of Gloucester, that the prevailing party should recover his expenses as costs from his adversary; and where the recovery is less than five hundred dollars no costs are allowed, and the common law is in effect restored in such cases. (*Gibson v. Memphis & C. R. Co.*, 31 Fed. Rep. 553.)

§ 497. Cases under revenue laws—Collectors.—It shall be the duty of every collector of internal revenue to report within ten days to the district attorney of the district in which any fine, penalty, or forfeiture may be incurred for the violation of any law of the United States relating to the revenue, a statement of all the facts and circumstances of the case within his knowledge, together with the names of the witnesses, and which may come to his knowledge from time to time, stating the provisions of the law believed to be violated, and on which a reliance may be had for condemnation or conviction; and if any collector shall in any case fail to report to the proper district attorney as prescribed in this section, his right to any compensation, benefit, or allowance in such case shall be forfeited to the United States, and the same may, in the discretion of the

secretary of the treasury, be awarded to such persons as may make complaint and prosecute the same to judgment or conviction. (Rev. Stats., sec. 3164.)

§ 498. Compromises.—The commissioner of internal revenue, with the advice and consent of the secretary of the treasury, may compromise any civil or criminal case arising under the internal revenue laws instead of commencing suit thereon; and, with the advice and consent of the said secretary and the recommendation of the attorney-general, he may compromise any such case after a suit thereon has been commenced. Whenever a compromise is made in any case, there shall be placed on file in the office of the commissioner the opinion of the solicitor of internal revenue, or of the officer acting as such, with his reasons therefor, with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the compromise. (Rev. Stats., sec. 3229.)

§ 499. Remission of fines.—The secretary of the treasury is authorized to prescribe such rules and modes of proceeding to ascertain the facts upon which an application for remission of a fine, penalty, or forfeiture is founded, as he deems proper, and, upon ascertaining them,

to remit the fine, penalty, or forfeiture, if in his opinion it was incurred without willful negligence or fraud, in either of the following cases:—

First. If the fine, penalty, or forfeiture was imposed under authority of any revenue law, and the amount does not exceed one thousand dollars.

Second. Where the case occurred within either of the collection districts in the states of California or Oregon.

Third. If the fine, penalty, or forfeiture was imposed under authority of any provisions of law relating to the importation of merchandise from foreign contiguous territory, or relating to manifests for vessels enrolled or licensed to carry on the coasting trade on the northern, northeastern, and northwestern frontiers.

Fourth. Repealed.

Fifth. If the fine, penalty, or forfeiture was imposed by authority of any provisions of law for levying or collecting any duties or taxes, or relating to registering, recording, enrolling, or licensing vessels, and the case arose within the collection district of Alaska, or was imposed by virtue of any provisions of law relating to fur-seals upon the islands of Saint Paul and Saint George. (Rev. Stats., sec. 5293.)

§ 500. Discontinuances.—No discontinuance or *nolle prosequi* of any prosecution under section three thousand two hundred and fifty-seven shall be allowed without the permission

in writing of the secretary of the treasury and the attorney-general. (Rev. Stats., sec. 3230.)

§ 501. **Continuances.**—It shall be lawful for any court in which any suit or criminal proceeding arising under the internal revenue laws may be pending to continue the same at any stage thereof, for good cause shown on motion by the district attorney. (Rev. Stats., sec. 3231.)

§ 502. **Costs in revenue suits upon information.**—When a suit for the recovery of any penalty or forfeiture accruing under any law providing internal revenue is brought upon information received from any person other than a collector, deputy collector, or inspector of internal revenue, the United States shall not be subject to any costs of suit. (Rev. Stats., sec. 969.)

§ 503. **Costs when reasonable cause of seizure.**—When, in any prosecution commenced on account of the seizure of any vessel, goods, wares, or merchandise, made by any collector or other officer, under any act of Congress authorizing such seizure, judgment is rendered for the claimant, but it appears to the court that there was reasonable cause of seizure, the court shall cause a proper certificate thereof to be entered, and the claimant shall not, in such case, be entitled to costs, nor shall the person who made the seizure, nor the prose-

cutor, be liable to suit or judgment on account of such suit or prosecution; *provided*, that the vessel, goods, wares, or merchandise be, after judgment, forthwith returned to such claimant or his agent. (Rev. Stats., sec. 970.)

Probable cause.—Probable cause imports a seizure made under circumstances which warrant suspicion. (*Lacker v. U. S.*, 7 Cranch, 339; *U. S. v. Gay*, 2 Gall. 359; *The George*, 1 Mason, 24; *La Jeune Eugenie*, 2 Mason, 409; *Averill v. Smith*, 17 Wall. 82; *Shattuck v. Maley*, 1 Wash. C. C. 245; *One Sorrel Horse*, 22 Vt. 656; *The Reindeer*, 14 Law Rep. 235; *The La Manche*, 25 Law Rep. 585.) A certificate may be given where there is a doubt as to the true construction of a statute (*U. S. v. Riddle*, 5 Cranch, 311; *The Paulina*, 7 Cranch, 52; *Averill v. Smith*, 17 Wall. 82; *The Friendship*, 1 Gall. 111; *The Reindeer*, 14 Law Rep. 235); it is never given in the admiralty except in cases under the revenue and navigation acts. (*The Marianna Flora*, 11 Wheat. 1; *The Palmyra*, 12 Wheat. 1; *Lovett v. Bispham*, 2 Alb. L. J. 97.) If given the claimant is not entitled to costs (*In re Stover*, 1 Curt. 93); and when given it is a bar to an action for damages for seizure. (*Gelston v. Hoyt*, 3 Wheat. 246; *Averill v. Smith*, 17 Wall. 82.) But where the collector does not apply for the certificate until after he has been sued he may be required to pay the costs (*The Recorder*, 2 Blatchf. 119); and if the goods are in his hands it is his duty to surrender them as soon as they are acquitted. (*Averill v. Smith*, 17 Wall. 82.) If there is a decree of acquittal, and a denial of the certificate, the seizure is tortious, and the owner is entitled to full damages (*Gelston v. Hoyt*, 3 Wheat. 246; *The Appollon*, 9 Wheat. 362); but the actions to recover damages cannot be commenced while proceedings to enforce the forfeiture are pending. (*Gelston v. Hoyt*, 3 Wheat. 246; *Averill v. Smith*, 17 Wall. 82.) The claimant must move the court for the necessary orders to cause the property or its proceeds to be returned to the owner. (*Averill v. Smith*, 17 Wall. 82.) The opinion of the attorney-general, and the instruc-

tions of the secretary of the treasury based thereon, constitute reasonable cause for seizure. (The Recorder, 2 Blatchf. 119.) If the goods are taken from the collector the certificate is a protection, although the marshal omits to return the goods to the owner. (Averill v. Smith, 17 Wall. 82.) And where restitution is accepted without qualification it is a mutual release, and bars all claim for damages. (Lovett v. Bispham, 2 Alb. L. J. 97.) Where a sale of a condemned vessel in the custody of the marshal was, by agreement between the proctors of the parties, postponed, the marshal was entitled to the costs of keeping his watchman also aboard of the vessel. (The San Jacinto, 30 Fed. Rep. 266.)

§ 504. Double costs on nonsuit in action against officer.—If, in any suit against an officer or other person executing or aiding or assisting in the seizure of goods, under any act providing for or regulating the collection of duties on imports or tonnage, the plaintiff is nonsuited, or judgment passed against him, the defendant shall recover double costs. (Rev. Stats., sec. 971.)

§ 505. In copyright suits, costs.—In all recoveries under the copyright laws, either for damages, forfeitures, or penalties, full costs shall be allowed thereon. (Rev. Stats., sec. 972.)

§ 506. Costs, infringement of patent.—When judgment or decree is rendered for the plaintiff or complainant, in any suit at law or in equity, for the infringement of a part of a patent, in which it appears that the patentee, in his specification, claimed to be the original

and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor, no costs shall be recovered, unless the proper disclaimer, as provided by the patent laws, has been entered at the patent-office before the suit was brought. (Rev. Stats., sec. 973.)

Note.—A patentee is not for an infringement entitled to reimbursement for counsel fees paid by him. (*Parks v. Booth*, 102 U. S. 96.) If the verdict affirms the validity of all the claims, and the novelty of the invention in each, a subsequent disclaimer of one or more claims will not deprive of the right to costs. (*Elastic Fabric Co. v. Smith*, 100 U. S. 110; *Peek v. Frames*, 5 Fish. 211.)

§ 507. When costs of prosecution to be paid by defendant.—When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution. (Rev. Stats., sec. 974.)

§ 508. When costs are recovered by defendant in a prosecution.—If any informer or plaintiff on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the de-

fendant, the court shall award to the defendant his costs, unless such informer or plaintiff is an officer of the United States specially authorized to commence such prosecution, and the court, at the trial in open court, certifies upon the record that there was reasonable cause for commencing the same; in which case no costs shall be adjudged to the defendant. (Rev. Stats., sec. 975.)

§ 509. Fees of clerk, marshal, etc., by whom payable.—If any informer on a penal statute, to whom the penalty or any part thereof, if recovered, is directed to accrue, discontinues his suit or prosecution, or is nonsuited therein, or if upon trial judgment is rendered in favor of the defendant, such informer shall be alone liable to the clerk, marshal, and attorney for the fees of such prosecution, unless he is an officer of the United States whose duty it is to commence such prosecution, and the court certifies that there was reasonable cause for commencing the same, in which case the United States shall be responsible for such fees. (Rev. Stats., sec. 976.)

Note.—The words “the fees of such prosecution” refer to fees for services rendered to the party prosecuting, and to those only. (In re Stover, 1 Curt. 93.) If the informer is an officer, and he obtains from the court a certificate of probable cause, the fees must be paid by the United States. (In re Stover, 1 Curt. 93.) The name of the informer need not be written at the foot of the indictment. (U. S. v. Mundell, 1 Hughes, 415.)

§ 510. Costs, non-joinder of action.—If several actions or processes are instituted, in a court of the United States or one of the territories, against persons who might legally be joined in one action or process touching the matter in dispute, the party pursuing the same shall not recover, on all of the judgments therein which may be rendered in his favor, the costs of more than one action or process, unless special cause for said several actions or processes is satisfactorily shown on motion in open court. (Rev. Stats., sec. 977.)

Note.—Two separate libels in admiralty of a like nature, involving substantially the same questions, may be consolidated. (*Rogers v. Hurney*, 4 Cliff. 582.)

§ 511. Costs in libels against vessel and cargo.—When proceedings are had before a court of the United States or of the territories, on several libels against any vessel and cargo, which might legally be joined in one libel, there shall not be allowed thereon more costs than on one libel, unless special cause for libeling the vessel and cargo separately is satisfactorily shown on motion in open court. And in proceedings on several libels or informations against any cargo, or parts of cargo, or merchandise seized as forfeited for the same cause, there shall not be allowed more costs than would be lawful on one libel or information, whatever may be the number of owners of consignees therein concerned. But allowance may be made on one libel or information for the

costs incidental to several claims. (Rev. Stats., sec. 978.)

Note.—Where unnecessary libels or claims are filed it is at the peril of paying costs. (The Henry Ewbanks, 1 Sum. 400.) If two libels are filed simultaneously for seamen's wages, the costs of one libel only and one seizure can be taxed. (The Cabot, Abb. Adm. 150; The R. P. Chase, 3 Ware, 294.) This section is merely in affirmance of the pre-existing law (Salmon Falls Mfg. Co. v. The Tangier, 3 Ware, 110); but there is nothing in this section which compels parties having a like cause of action founded on a several liability to join under a penalty of forfeiture of costs. (The Young Mechanic, 3 Ware, 58.)

§ 512. Claimant's costs when paid before possession.—When judgment is rendered in favor of the claimant of any vessel or other property seized on behalf of the United States, and libeled or informed against as forfeited under any law thereof, he shall be entitled to possession of the same when his own costs are paid. (Rev. Stats., sec. 979.)

Note.—Claimant must pay the clerk's and marshal's fees before he can take possession of the property. (In re Stover, 1 Curt. 93.)

§ 513. District attorney's costs.—When a district attorney prosecutes two or more indictments, suits, or proceedings which should be joined, he shall be paid but one bill of costs for all of them. (Rev. Stats., sec. 980.)

Note.—When several attachments for contempt are issued, the district attorney is entitled to only one docket fee. (Riggs v. Supervisors, 1 Woolw. 377.)

§ 514. Taxation of fees of witness.—In no case shall the fees of more than four witnesses be taxed against the United States, in the examination of any criminal case before a commissioner of a circuit court, unless their materiality and importance are first approved and certified to by the district attorney for the district in which the examination is had; and such taxation shall be subject to revision, as in other cases. (Rev. Stats., sec. 981.)

§ 515. Attorney liable for costs vexatiously increased.—If any attorney, proctor, or other person admitted to conduct causes in any court of the United States, or of any territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased. (Rev. Stats., sec. 982.)

Note.—If a vessel seized under one libel is released on stipulation, it may be taken under successive libels. (The *Young Mechanic*, 3 Ware, 58.) If a proctor presents an unreasonable number of petitions for separate claims his fees may be reduced. (The *Hinchman*, 7 Chic. L. N. 387.)

§ 516. Bill of costs, how taxed.—The bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in

favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause. (Rev. Stats., sec. 983.)

Taxation of costs.—The fees of a witness cannot be taxed against the adverse party, unless they have been paid. (The Highlander, 19 How. Pr. 334.) So no costs can be awarded when a case is dismissed for want of jurisdiction. (Abbey v. The Stevens, 22 How. Pr. 78; Hornthall v. The Collector, 9 Wall. 560; Mayor v. Cooper, 6 Wall. 247; The McDonald, 4 Blatchf. 477; Maxfield v. Levy, 4 Dall. 330; Agnew v. Dorman, Taney, 386; Lowe v. Benjamin, 1 Wall. Jr. 187; Burnham v. Rangeley, 2 Wood. & M. 417.) If there are several suits, costs are taxed in each (Ferrett v. Atwill, 1 Blatchf. 151); and if there are several defendants, several costs may be allowed. (Crosby v. Folger, 1 Sum. 514.) Where several suits are consolidated, costs in each will be taxed up to the time of consolidation, and after that only on the consolidated suit. (Simpson v. Caulkins, Abb. Adm. 539.) No judgment or decree can be rendered against the United States for costs (U. S. v. La Vengeance, 3 Dall. 297; U. S. v. Hooe, 3 Cranch, 73; U. S. v. Barker, 2 Wheat. 395); nor can a marshal claim a lien for fees (The Antelope, 12 Wheat. 546); yet a party having such a claim may set it up as a defense in an action against him, brought by the United States. (U. S. v. Ringgold, 8 Pet. 150.) The court cannot adjudge costs *de novo* on an appeal from the taxation (The Caithnessshire, Abb. Adm. 163), and unless the party appealing demands a specification of items the charge will be considered as acquiesced in. (Dedekam v. Vose, 3 Blatchf. 153.) Where a dispute arises in regard to fees, the case should be referred to a person as auditor to hear and report the case. (Bottomley v. U. S., 1 Story, 153). The federal fee-bill (Act of 1853, U. S. Rev. Stats., sec. 983) abolished all former practice and laws on the subject of fees and costs in the courts of the United States,

and prescribed the items composing a bill of costs to be taxed against the losing party. (*O'Neil v. Kansas City S. & M. R. Co.*, 31 Fed. Rep. 663.) In our federal practice the acts of Congress are not superseded by the state statutes, even if such statutes may be construed as permitting a more indulgent practice. (See *Ford v. Louisville etc. R. Co.*, 45 Fed. Rep. 210.)

§ 517. Bill of costs to be sworn to.—Before any bill of costs shall be taxed by any judge or other officer, or allowed by any officer of the treasury, in favor of clerks, marshals, commissioners, or district attorneys, the party claiming such bill shall prove by his own oath, or that of some other person having a knowledge of the facts, to be attached to such bill, and filed therewith, that the services charged therein have been actually and necessarily performed, as therein stated. (Rev. Stats., sec. 984.)

Note.—The requirement of an affidavit that the services charged have been actually and necessarily performed applies to all cases, and not to government cases only. (*Jerman v. Stewart*, 12 Fed. Rep. 276.)

§ 518. Executions to run in all the districts of the state.—All writs of execution upon judgments or decrees obtained in a circuit or district court, in any state which is divided into two or more districts, may run and be executed in any part of such state; but shall be issued from, and made returnable to, the court wherein the judgment was obtained. (Rev. Stats., sec. 985.)

Note.—A writ of execution issued to the marshal of one district may be executed by the marshal of the other district (*Provost v. Gorrell*, 5 Week. Notes, 151); and if a state be divided into two districts, a judgment for one district will be a lien on land in the other district. (*Provost v. Gorrell*, 5 Week. Notes, 151.) A plaintiff who resides in another district may be required to give security for costs. (*Lyman V. & R. Co. v. Southard*, 12 Blatchf. 405.)

§ 519. Executions in favor of U. S. to run in every state.—All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one state, may run and be executed in any other state, or in any territory, but shall be issued from, and made returnable to, the court wherein the judgment was obtained. (Rev. Stats., sec. 986.)

§ 520. Execution stayed on conditions.
—When a circuit court enters judgment in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may, on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of forty-two days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said court.

If a new trial be granted, the former judgment shall be thereby rendered void. (Rev. Stats., sec. 987.)

Note.—Congress did not intend to suspend the operation of a judgment so as to allow application for new trial beyond a period of forty-two days from its rendition (*Cambuston v. U. S.*, 95 U. S. 235); and an application to strike out a judgment after the lapse of the term is not within the terms of this section. (*Popino v. McAllister*, 4 Wash. C. C. 393.) The right to apply for a new trial is independent of this section. It provides for a case where a party deserves an extension of the time within which to make application. (*Rutheford v. Penn. Mut. Life Ins. Co.*, 1 Fed. Rep. 456; 1 McCrary, 120.) The motion need not be based upon petition except when made after judgment. (*Emma S. M. Co. v. Park*, 14 Blatchf. 411.)

§ 521. Judgment debtor, continuance.

—In any state where judgments are liens upon the property of the defendant, and where, by the laws of such state, defendants are entitled, in the courts thereof, to a stay of execution for one term or more, defendants in actions in the courts of the United States, held therein, shall be entitled to a stay of execution for one term. (Rev. Stats., sec. 988.)

§ 522. Execution against officers of revenue.—When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the treasury, in the performance of his official duty, and the court certifies that there was probable cause

for the act done by the collector or other officer, or that he acted under the directions of the secretary of the treasury, or other proper officer of the government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the treasury. (Rev. Stats., sec. 989.)

Note.—The term “officer of the revenue” means an officer of the revenue from customs. (Campbell v. James, 18 Blatchf. 196; S. C., 8 Fed. Rep. 515.) His claim for credit for taxable costs not taxed cannot be admitted on a trial unless presented and disallowed. (U. S. v. Ingersoll, Crabbe, 135.) A judge may grant the certificate although he is not the judge before whom the verdict was rendered (Cox v. Barney, 14 Blatchf. 289); and it may be issued not only to prevent the issuing of an execution, but to stay one already issued. (Cox v. Barney, 14 Blatchf. 289.) It is the duty of the court to grant it although the money may not be paid under it. (Cox v. Barney, 14 Blatchf. 289.) Whether it ought to be granted cannot be determined before trial. (Andrae v. Redfield, 12 Blatchf. 407.) The words “officer of the revenue” mean of the revenue of customs. (Campbell v. James, 3 Fed. Rep. 513.) It is not only necessary that there be a recovery against the collector, but there must be a certificate of probable cause before the liability of the government begins. (White v. Arthur, 10 Fed. Rep. 83; following U. S. v. Sherman, 98 U. S. 565.)

§ 523. Imprisonment for debt.—No person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished. And all modifications, condi-

tions, and restrictions upon imprisonment for debt provided by the laws of any state, shall, be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state. (Rev. Stats., sec. 990.)

Arrest of debtor.—A debtor is not liable to arrest on federal process unless liable to arrest under the state laws (Gray v. Munroe, 1 McLean, 523; Wilber v. Ingersoll, 2 McLean, 322); and this limitation applies as well to admiralty courts as to others. (The Kentucky, 4 Blatchf. 448; Louisiana Ins. Co. v. Nickerson, 2 Low. 310; Fry v. Cook, 8 Chic. L. N. 286; The Blanche Page, 16 Blatchf. 1; but see Gardner v. Isaacson, Abb. Adm. 141; Garnes v. Travis, Abb. Adm. 422; Hanson v. Fowle, 1 Saw. 497; Marshall v. Bazin, 7 N. Y. Leg. Obs. 342; Hodge v. Bemis, 12 Law Rep. 470.) Where the state law does not allow imprisonment for debt after the debtor has surrendered his property, he cannot be arrested on federal court process. (Moan v. Wilmarth, 3 Wood. & M. 399.) The proceedings in all cases of arrest on mesne process must conform to practice as prescribed by state law. (In re Bergen, 2 Hughes, 513.) All constructions in the absence of fraud should lean in favor of personal liberty. (Moan v. Wilmarth, 3 Wood. & M. 399.) So where a state law modifies imprisonment for debt the modification is adopted (Low v. Durfee, 5 Fed. Rep. 256; United States v. Tetlow, 2 Low. 159; but see Catherwood v. Gapete, 2 Curt. 94; In re Freeman, 2 Curt. 491; Campbell v. Hadley, 1 Sprague, 470); as a law exempting an insolvent who has received a discharge from imprisonment (Leon v. Durfee, 5 Fed. Rep. 256); or where the state law imposes conditions or restrictions upon the power to imprison a debtor (Catherwood v. Gapete, 2 Curt. 94); or where it prohibits imprisonment in certain cases this section adopts the modification. (U. S. v. Tetlow, 2 Low. 159.) The verification of papers for the arrest of a debtor may be made

before a commissioner of the United States. (Fulton v. Gilmore, 2 Flip. 260; 10 Chic. L. N. 108.) Whether defendant is liable to arrest on execution depends on the state statute. (U. S. v. Moller, 10 Ben. 189.)

§ 524. Discharge from arrest or imprisonment.—When any person is arrested or imprisoned in any state, on mesne process or execution issued from any court of the United States, in any civil action, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the courts of such state. The same oath may be taken, and the same notice thereof shall be required, as may be provided by the laws of such state, and the same course of proceedings shall be adopted as may be adopted in the courts thereof. But all such proceedings shall be had before one of the commissioners of the circuit court for the district where the defendant is so held. (Rev. Stats., sec. 991.)

Discharge from arrest.—Where state laws can be executed conveniently and properly by federal courts and judges, they have been adopted as incident to the remedy, and are cumulative, and in addition to this section (Duncan v. Darst, 1 How. 301); but this section does not adopt state laws prospectively. (In re Freeman, 2 Curt. 491; Campbell v. Hadley, 1 Sprague, 470.) This section is obligatory on sheriffs, and no discharge from jail under a state law not in conformity therewith will exonerate the sheriff. (McNutt v. Bland, 2 How. 1.) So a discharge by a state official under a state law will not authorize a release from prison on process issued from a federal court. (McNutt v. Bland, 2 How. 1; Duncan v. Darst, 1 How.

301; *Bank v. Tyler*, 4 Pet. 366; *Catherwood v. Gapete*, 2 Curt. 94; *In re Hopkins*, 2 Curt. 567; *In re Thomas*, 30 Leg. Int. 344.) In adopting state legislation Congress adopted the proceedings only so far as they are analogous and applicable. (*Lockhurst v. West*, 48 Mass. 230.) If the United States sues for a penalty, its judgment can only be enforced by process under state law, and a discharge under a state law will be valid. (*Stearns v. U. S.*, 2 Paine, 300; see *U. S. v. Tetlow*, 2 Low. 159; but see *U. S. v. Hewes, Crabbe*, 307.) A discharge under this section does not release the debtor from his liability (*King v. Riddle*, 7 Cranch, 168); but if the lien of a judgment is surrendered by levying a *capias ad satisfaciendum*, a discharge under this section will not revive it. (*Snead v. McCoull*, 12 How. 407.)

§ 525. Privileges of jail limits.—Persons imprisoned on process issuing from any court of the United States in civil actions, as well at the suit of the United States as at the suit of any person, shall be entitled to the same privileges of the yards of the respective jails as persons confined in like cases on process from the courts of the respective states are entitled to, and under the like regulations and restrictions. (Rev. Stats., sec. 992.)

Note.—This section adopts state laws in force at the time of its passage. (*U. S. v. Knight*, 14 Peters, 301; *S. C.*, 3 Sum. 358.) It embraces executions at the suit of the United States. (*U. S. v. Knight*, 14 Peters, 301.) When a prisoner is regularly committed to a state jail by the marshal, he is no longer in custody of the marshal, nor under his authority or command. (*Randolph v. Donaldson*, 9 Cranch, 76; see *United States v. Harden*, 10 Fed. Rep. 802; 4 Hughes, 455.)

§ 526. Goods taken on a fieri facias, how appraised.—When it is required by the

laws of any state that goods taken in execution on a writ of *fiери facias* shall be appraised before the sale thereof, the appraisers appointed under the authority of the state may appraise goods taken in execution on a *fiери facias* issued out of any court of the United States, in the same manner as if such writ had issued out of a court of such state. And the marshal in whose custody such goods may be shall summon the appraisers, in the same manner as the sheriff is, by the laws of such state, required to summon them; and if the appraisers, being duly summoned, fail to attend and perform the duties required of them, the marshal may proceed to sell such goods without an appraisalment. When such appraisers attend they shall be entitled to the like fees as in cases of appraisalments under the laws of the state. (Rev. Stats., sec. 993.)

Note.—This section proceeds on the idea that state appraisalment laws have been adopted, and the officer may avail himself of those persons selected by local tribunals to appraise property taken on execution. (Wayman v. Southard, 10 Wheat. 1.)

§ 527. Death of marshal after levy or sale.—When a marshal dies, or is removed from office, or the term of his commission expires, after he has taken in execution, under process from a court of the United States, any lands, tenements, or hereditaments, and before sale or other final disposition thereof, the like process shall issue to the succeeding marshal, and the same proceeding shall be had as if

such marshal had not died or been removed, or the term of his commission had not expired. And when a marshal dies or is removed from office, or the term of his commission expires, after he has sold any lands, tenements, or hereditaments, under process from a court of the United States, and before a deed for the same is executed by him to the purchaser, such court may, on application by the purchaser, or by the plaintiff at whose suit the sale was made, setting forth the case and the reason why the title was not perfected by said marshal, order the marshal for the time being to perfect the title and execute a deed to the purchaser, upon his paying the purchase-money and costs remaining unpaid. (Rev. Stats., sec. 994.)

Note.—If a marshal is removed from office after the sale and before the execution of a deed to the purchaser, his successor may execute the deed (Byers v. Fowler, 12 Ark. 218); and if removed after he has made a levy a new writ may be issued to his successor, and all rights of the judgment creditor will remain as under the prior writ. (Doolittle v. Bryan, 14 How. 563.) If the purchaser obtains an order directing the successor to make the deed, such order is a mere *ex parte* proceeding, and not a judicial act. (Merchants' Bank v. Evans, 51 Mass. 335.) A deed executed by the marshal should be admitted to record in the state courts. (Byers v. Fowler, 12 Ark. 218. And if a state law makes the certificate of purchase assignable, a deed made to such assignee will be valid. (Martin v. Gilmore, 72 Ill. 193.)

§ 528. Moneys paid into court.—All moneys paid into any court of the United States, or received by the officers thereof, in any cause

pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court; *provided*, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court. (Rev. Stats., sec. 995.)

Money in the hands of the clerk of a court is not liable to attachment. (The Lottawanna, 20 Wall. 201.) Money received by a master in chancery in payment of property sold upon the foreclosure of a mortgage ought, in pursuance of U. S. Rev. Stats., sec. 995, to be deposited with a designated depository of the United States; and the clerk is entitled to his commission thereon. (Thomas v. Chicago & C. S. R. Co., 37 Fed. Rep. 548.)

§ 529. Moneys deposited, how withdrawn.—No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn. (Rev. Stats., sec. 996.)

CHAPTER XXI.

PROCEDURE ON ERROR AND APPEAL.

- § 530. Removal of causes by writ of error.
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- § 543. Damages and costs on affirmance in error.
- § 544. Reversal on error limited.
- § 545. Appeals from circuit courts to supreme court.
- § 546. Where both parties appeal to the supreme court, one record sufficient.

§ 530. Removal of causes by writ of error.—There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party. (Rev. Stats., sec. 997.)

Transcript.—A record which is merely authenticated by the clerk or judge is not properly verified (*Wilson v. Daniel*, 3 Dall. 401); and if the case was tried on an agreed statement of facts, a record which omits the other proceedings is insufficient. (*Keene v. Whittaker*, 13 Peters, 459; *Curtis v. Petitpain*, 18 How. 109.) If the transcript is

returned within proper time with the copy of the writ of error it is sufficient (*Mussina v. Cavoza*, 6 Wall. 355); as a rigid and literal fulfillment of everything prescribed is not an indispensable requisite to the jurisdiction of the supreme court (*Mussina v. Cavoza*, 6 Wall. 355); but the original writ of error should be returned. (*Mussina v. Cavoza*, 6 Wall. 355.) The transcript is sufficient although it omits the names of jurors (*Owens v. Hanney*, 9 Cranch, 180); and is sufficient if authenticated by the signature of the deputy clerk and sealed with the seal of the court. (*Garneau v. Dozier*, 100 U. S. 7.) The certificate of the clerk is *prima facie* evidence that the transcript is a true copy of all the proceedings in the case. (*The Rio Grande*, 19 Wall. 178.) A failure to annex to, or return with, a writ of error, an assignment of errors, as required by Rev. Stat., sec. 997, is no ground for dismissal for want of jurisdiction. If the assignment is filed in accordance with the requirements of rule 21, par. 4, it will ordinarily be enough. (*School Dist. of Ackley v. Hall*, 106 U. S. 428.) Where no assignment of error was returned with the writ of error to a state court, as required by this section, and no counsel appeared for the plaintiff in error, the judgment will be affirmed. (*Dagger v. Tayloe*, 121 U. S. 286.)

Citation.—The citation is not necessarily a part of the record; the presumption is, that one was issued (*Innerarity v. Byrne*, 5 How. 295); it is simply a notice to the opposite party to appear or decline to appear (*Cohens v. Virginia*, 6 Wheat. 264); and judgment cannot be given against him for his non-appearance (*Cohens v. Virginia*, 6 Wheat. 264); and a clerical error in it will not vitiate the proceedings. (*Davidson v. Lainer*, 4 Wall. 447.) If it is to appear at the current term of the supreme court the case will be dismissed (*Yeaton v. Lenox*, 7 Peters, 220); but it may be issued at any time, provided it is issued and served before the term of the supreme court next succeeding the entry of the appeal. (*Villalobos v. U. S.*, 6 How. 81; *Hudgins v. Kemp*, 18 How. 530.) When issued to one not a party to the suit the writ will be dismissed. (*Davenport v. Fletcher*, 16 How. 142.) So if it differs from the writ of error in the description of the person it will be dismissed (*Kail v. Wetmore*, 6 Wall. 451), unless the misdescription

is not sufficient to mislead (*Reale v. Phipps*, 8 How. 256); and although addressed to the original party instead of to the administrator, the counsel may waive the irregularity. (*Bigler v. Walter*, 12 Wall. 142.)

The writ of error.—No one can sue out the writ unless he is a party to the judgment (*Payne v. Niles*, 20 How. 219); but if a judgment is joint and several one may sue it out (*Cox v. U. S.*, 6 Peters, 172); but not if the judgment is joint (*Williams v. Bank*, 11 Wheat. 114; *Wilson v. Fire & L. Ins. Co.*, 12 Peters, 140; *Hampton v. House*, 13 Wall. 187; *Simpson v. Greeley*, 20 Wall. 152); yet a party against whom a separate judgment is rendered may sue it out. (*Germain v. Mason*, 12 Wall. 259.) Where parties have refused to join in a writ of error, one of several parties may sue it out (*Masterson v. Herndon*, 10 Wall. 416; *O'Dowd v. Russell*, 14 Wall. 102); but the irregularity is waived by appearance and defense. (*Amis v. Smith*, 16 Peters, 303.) If dismissed on account of irregularity a second may issue (*Deneale v. Shimp*, 8 Peters, 526); and the names of the parties who apply must be set forth. (*Deneale v. Shimp*, 8 Peters, 526; *Wilson v. Life & F. Ins. Co.*, 12 Peters, 140.) The issue of a subsequent writ and citation not served cannot prejudice the prior writ and citation. (*Davidson v. Lamer*, 4 Wall. 447.) If the copy lodged with the clerk is correct it is sufficient. (*U. S. v. Six Lots*, 1 Woods, 234.) Where the writ of error was served before the return day, but not returned until after expiration of the term, an appearance is a waiver of the irregularity (*Wood v. Lide*, 4 Cranch, 480; *Pickett v. Legerwood*, 7 Peters, 144); but if not returned at the next term it is null. (*Blair v. Miller*, 4 Dall. 21.) In case of the death of defendant after entry of judgment, the suit should be revived and the writ of error sued out. (*McClane v. Boon*, 6 Wall. 244.)

§ 531. Citation.—When the writ is issued by a circuit court to a district court, the citation shall be signed by the judge of such district court, or by the circuit judge of such circuit court, or by a justice of the supreme

court, and the adverse party shall have at least twenty days' notice. (Rev. Stats., sec. 998.)

§ 532. Citation, supreme court.—When the writ is issued by the supreme court to a circuit court, the citation shall be signed by a judge of such circuit court, or by a justice of the supreme court, and the adverse party shall have at least thirty days' notice; and when it is issued by the supreme court to a state court, the citation shall be signed by the chief justice, or judge, or chancellor of such court rendering the judgment or passing the decree complained of, or by a justice of the supreme court of the United States, and the adverse party shall have at least thirty days' notice. (Rev. Stats., sec. 999.)

Issued to a state court.—Although the judge of another circuit holds the circuit court, yet he cannot sign a citation when the writ is issued to a state court (*Tompkins v. Mahoney*, 32 Cal. 231; *Donner v. Palmer*, 1 Pac. Law Mag. 291); and if signed by a judge of the district court, the writ will be dismissed. (*Palmer v. Donner*, 7 Wall. 541.) If judgment was rendered by the appellate court, the writ may be allowed by the chief justice of that court (*Aldrich v. Aetna Ins. Co.*, 8 Wall. 491), or by an associate justice (*Bartemeyer v. Iowa*, 14 Wall. 26); but no writ can issue without allowance by the proper judge, or the chief justice of the supreme court (*Gleason v. Florida*, 9 Wall. 779); and the justice has a discretion in granting or refusing the application for a citation (*Hart v. Burnett*, 20 Cal. 170; *Greely v. Townsend*, 25 Cal. 604; see *Twitchell v. Com.*, 7 Wall. 321; *Gleason v. Florida*, 9 Wall. 779); and the right to a writ ought not to be finally passed upon by a judge at chambers. (*Buell v. Van Ness*,

8 Wheat. 312.) A certificate of a chief justice of the highest court of a state, under this section, allowing a writ of error to such court from the supreme court, certifying that a federal question arose and was determined adversely to the plaintiff in error, cannot supply the want of all evidence of such question in the record. (*Felix v. Scharnweber*, 125 U. S. 54; see *Butler v. Gage*, 138 U. S. 52.)

Thirty days' notice.—A service of citation is necessary to give jurisdiction (*Dayton v. Lash*, 94 U. S. 112); but service on the attorney or counsel is sufficient (*Bacon v. Hart*, 1 Black, 38; *U. S. v. Curry*, 6 How. 106; *Bigler v. Waller*, 12 Wall. 142); but a service on the partner of counsel is not sufficient if not attorney of record. (*Bacon v. Hart*, 1 Black, 38.) The citation may be served on the husband of a *feme covert*. (*Fairfax v. Fairfax*, 5 Cranch, 19.) Thirty days' notice means thirty days before the return day of the writ of error (*Yeaton v. Lenox*, 7 Pet. 220), or that defendant shall have at least thirty days' notice before being compelled to go to a hearing (*National Bank v. Bank of Commerce*, 99 U. S. 608), and a service of the citation after the return day, but during the return term is sufficient. (*O'Dowd v. Russell*, 14 Wall. 402; see *Dayton v. Lash*, 94 U. S. 112; *Railroad Co. v. Blair*, 100 U. S. 661.) If the citation is not served thirty days before the first day of the term, the case cannot be taken up at that term except by consent. (*Welsh v. Mandeville*, 5 Cranch, 321; *Lloyd v. Alexander*, 1 Cranch, 365.) The time and manner for transmission of the record is regulated by act of Congress. (*U. S. v. Curry*, 6 How. 106; see *Lloyd v. Alexander*, 1 Cranch, 365.)

Citation on writ issued to circuit court.—The power to sign the citation is not confined to the justice assigned to the circuit. (*Sage v. Railroad Co.*, 96 U. S. 112.) It may be signed by one of the judges of the territorial court (*Sheppard v. Wilson*, 5 How. 210); but if signed by the clerk of the circuit court and not by the judge, it is irregular (*U. S. v. Hodge*, 3 How. 534; *Chaffee v. Hayward*, 20 How. 208); but the appearance of defendants on error waives the irregularity. (*Aldrich v. Ætna Co.*, 8 Wall.

491.) It cannot be issued by any judge or justice except the one who allows the writ of error. (*Insurance Co. v. Mordecai*, 21 How. 195.) A district judge may allow the appeal, although the decree was rendered on appeal from the district court. (*Rodd v. Heartt*, 17 Wall. 354.) When the appeal is entered in the clerk's office and not taken in open court, a citation signed by him is insufficient. (*Vil-labolas v. U. S.*, 6 How. 81.) And if the circuit court dis-allows the appeal, the party presenting a petition to the supreme court must file a copy of the record. (*Ray v. Law*, 3 Cranch, 179.)

§ 533. Bond in error and on appeal.—

Every justice or judge signing a citation on any writ of error shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas* as afore-said. (Rev. Stats., sec. 1000.)

Good and sufficient security.—This section does not prescribe any form of security; a bond given in the usual form has been the uniform practice (*Seymour v. Phillips & C. Const. Co.*, 7 Biss. 460); but it must be taken before the judge or justice, as the clerk alone has no power to take it. (*O'Reilly v. Edrington*, 96 U. S. 724; *National Bank v. Omaha*, 96 U. S. 737.) The requirement that the judge shall take good and sufficient security implies that he shall approve the bond, but an approval may be inferred from the facts (*Silver v. Ladd*, 5 Blatchf. 440); and if the judge who signs the citation takes the oath of the sureties to their sufficiency, it will be inferred that he approved the bond. (*Davidson v. Lanier*, 4 Wall. 447;

Silver v. Ladd, 5 Blatchf. 440.) If the usual affidavit of the sureties accompanies the bond at the time of its approval, no farther justification is required unless on allegation of their inability. (Hatch v. Codrington, 5 Blatchf. 523; see Hobson v. Johnson, 4 Biss. 505.) The mere fact that the sureties do not reside in the district is not a reason for objecting to the bond if in other respects unobjectionable. (Ex parte Milwaukee R. Co., 5 Wall. 188.) The bond may be approved by the judge at chambers (Hudgins v. Kemp, 18 How. 530); but if it is insufficient he cannot at chambers require a bond for an additional amount (Butchers' Asso. v. Slaughter House, 1 Woods, 50); but if after allowing a *supersedeas* rule he finds that the bond is insufficient, he may revoke the order. (Black v. Zacharie, 3 How. 483.) The refusal of the circuit court to accept a *supersedeas* bond during the term does not necessarily take away the power to approve one thereafter. (Sage v. Railroad Co., 96 U. S. 712.) A bond is not sufficient for appeal or for a *supersedeas* unless the obligors are bound for the payment of costs. (Seward v. Cornean, 102 U. S. 161.)

Approval of bond.—It is within the discretion of the judge to approve the bond with a penalty for less than double the amount. (Hatch v. Codrington, 5 Blatchf. 523.) And to diminish the amount of the penalty in proportion to the amount of bonds deposited. (Rubber Co. v. Goodyear, 6 Wall. 153.) In case of perishable property the actual loss may be taken into consideration. (Duncan v. M. & O. R. Co., 3 Woods, 597.) The judge who signs the citation is the sole and exclusive judge of the sufficiency of the security (Black v. Zacharie, 3 How. 483); as where damages are claimed (Ex parte French, 100 U. S. 1); his action is conclusive both as to the amount of the surety and the sufficiency of the sureties. (Jerome v. McCarter, 21 Wall. 17; Martin v. Hazard Powd. Co., 93 U. S. 302; Ex parte French, 100 U. S. 1.) After the allowance of the appeal the question of the sufficiency of the security becomes cognizable in the supreme court. (Rubber Co. v. Goodyear, 6 Wall. 153.) The supreme court cannot interfere to enlarge the security to cover

damages which plaintiff may recover for mesne profits, or other losses. (*Roberts v. Cooper*, 19 How. 373.)

Omission to give security.—The provision in this section is merely directory to the judge, and an omission to take the bond does not necessarily avoid the writ or the appeal; the supreme court may in such a case grant the proper relief (*Martin v. Hunter*, 1 Wheat. 304; *Anson v. Blue Ridge R. Co.*, 23 How. 1; *Davidson v. Lanier*, 4 Wall. 447; *Seymour v. Freer*, 5 Wall. 822; but see *Boyce v. Grandy*, 6 Peters, 777); and the party may be allowed time to give the bond (*Anson v. Blue Ridge R. Co.*, 23 How. 1; *Boobst v. Boobst*, 2 Wall. 96; *Seymour v. Freer*, 5 Wall. 822.) If the record shows no security taken, the appeal will be dismissed (*Boyce v. Grandy*, 6 Peters, 777); but the presumption is, that the judge who signed the citation took the security as required by law. (*Martin v. Hunter*, 1 Wheat. 304.) The objection that the bond was given by only one of several appellants may be taken by a preliminary motion to dismiss. (*Mandeville v. Riggs*, 2 Peters, 482.) The defendant must procure sureties although he is amply responsible (*Amer. Pave. Co. v. Elizabeth*, 6 Off. Gaz. 772); but the law does not require that the security shall be in any fixed proportion to the decree. (*Amer. Pave. Co. v. Elizabeth*, 6 Off. Gaz. 772.) In a proceeding on the relation of a party the bond may run to the state or to the relator. (*Spalding v. People*, 2 How. 66.) The amount recovered on execution is not to be apportioned where the unpaid balance exceeds the penalty of the bond. (*Ives v. Merchants' Bank*, 12 How. 159.) The proceeds of the sale must be first applied to the decree and the sureties left liable for the balance. (*Sessions v. Poutard*, 18 How. 106.) The omission to give the security as provided in this section is an irregularity merely, which may be subsequently cured. (*Brown v. McConnell*, 124 U. S. 489; *Stewart v. Masterson*, 124 U. S. 493.)

Security on appeal.—The appeal bond must be given to the opposite party (*Bigler v. Waller*, 12 Wall. 142), or it will be dismissed (*Davenport v. Fletcher*, 16 How. 142); yet if irregular in this regard, time may be

allowed to file a correct bond. (*Bigler v. Waller*, 12 Wall. 142.) Appellant must either give good and sufficient security to answer all damages and costs, or if he does not wish to supersede execution, sufficient security to answer for costs in case of affirmance. (*Hayford v. Griffith*, 3 Blatchf. 34.) A condition to the effect that appellant will pay the damages and costs, and damages rendered and to be rendered till decree is affirmed, covers the requirements of the statute (*Gay v. Parpart*, 101 U. S. 391); but it need not be sufficient to secure interest pending appeal. (*Jerome v. McCarte*, 21 Wall. 17.) When taken from an order directing the sale of property, the penalty will be little more than interest on the debt while the sale of the property was suspended. (*Wilmer v. A. & R. R. Co.*, 2 Woods, 147.) When the property necessarily follows the writ, indemnity to an amount sufficient to secure the sum received for use of the property and for incidental items is sufficient. (*French v. Shoemaker*, 12 Wall. 86.) A defendant in an equity suit may be compelled to pay the sum allowed to the master as compensation for his services, although an appeal is duly taken. (*Myers v. Dunbar*, 12 Blatchf. 380.) If a bill is dismissed without qualification, a preliminary injunction falls, although an appeal is taken. (*Eureka Consol. Min. Co. v. Richmond Min. Co.*, 5 Saw. 121.)

On writ of error.—If the judgment is severable, each may file a separate bond. (*Ex parte French*, 100 U. S. 1.) When it operates as a *supersedeas* the security must be sufficient to satisfy the whole amount of the judgment (*Catlett v. Boodie*, 9 Wheat. 553; *Tucker v. Lee*, 3 Cranch C. C. 684; *Bank v. Swann*, 4 Cranch C. C. 139; but see *Renner v. Bank*, 2 Cranch C. C. 310); and the judge cannot exercise any discretion. (*Stafford v. Union Bank*, 16 How. 135; 17 How. 275.) The condition of the bond is alternative that plaintiff in error either prosecutes his writ to effect or answer all damages and costs. (*Tucker v. Lee*, 3 Cranch C. C. 684.) A writ of error becomes *per se* a *supersedeas* upon compliance with the statute (*Tiernan v. Booth*, 4 Fed. Rep. 620; 9 Biss. 499; 109 U. S. 205; *Arnold v. Frost*, 9 Ben. 267), if a citation is issued and served before the next ensuing term of the supreme court

(Arnold v. Frost, 9 Ben. 267), where nothing appears in the record to the contrary (French v. Shoemaker, 12 Wall. 86); but if the value of the matter in dispute does not appear in the record it cannot operate as a *supersedeas*. (Williamson v. Kincaid, 1 Wall. 20.) A writ of error sued out in a criminal case in a state court stays execution of the sentence. (Bryan v. Bates, 94 Mass. 201.) A state court cannot determine whether a writ of error operates as a *supersedeas* or not. (Ex parte Dunn, 6 Rich., N. S., 307.) The fact that a citation was not presented to and signed by the judge within sixty days will not necessarily prevent a writ of error from operating as a *supersedeas*. (Tiernan v. Booth, 4 Fed. Rep. 620; 9 Biss. 499; 109 U. S. 205.)

Appeal—Supersedeas.—If a bond given on an appeal from a foreclosure decree is merely for costs, it will not stay the sale (Stafford v. Union Bank, 16 How. 135; 17 How. 275; Orchard v. Hughes, 1 Wall. 73); but the appeal will not be dismissed for that reason. (Orchard v. Hughes, 1 Wall. 73.) An appeal from a decree disallowing an injunction against a judgment at law does not supersede the judgment. (Grundy v. Young, 1 Cranch C. C. 443.) If the property is in charge of a receiver, an appeal operating as a *supersedeas* will not entitle the party to a delivery of the property to him. (Schenk v. Peay, 1 Dill. 267.) The *supersedeas* is but an appurtenant to the appeal, and ends when the appeal becomes inoperative, as by neglect to file the transcript. (Gilette v. Bullard, 20 Wall. 571.) An appeal and giving security operate as a stay of proceedings. (Fischer v. Hayes, 7 Fed. Rep. 99; 19 Blatchf. 184.) The condition of the bond that appellants "shall duly prosecute their said appeal with effect, and, moreover, pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed," meets all the requirements of this section. (Gay v. Parpart, 101 U. S. 391; see Babbitt v. Finn, 101 U. S. 7.) The court may modify a *supersedeas*, so as to allow a sale of mortgaged property. (Williams v. Clafin, 103 U. S. 753; following Jerome v. McCarter, 21 Wall. 31.)

Effect of supersedeas.—The only effect of a *supersedeas* is to prevent further proceedings in the lower court; it does not operate to nullify or to reverse an injunction. (Slaughter House Cases, 10 Wall. 273; Mowry v. Whitney, 3 Fish. 157.) After appeal in a prize case the district court can make no order concerning the property (The Peterhoff, Blatchf. Prize, 620); and no sale of the property can take place (The Sunbeam, Blatchf. Prize, 638), nor can the court attach for contempt for neglecting to comply with a judgment. (Frazer v. Cordozo, 6 Rich., N. S., 315.) The *supersedeas* operates to prevent the payment out of a fund in court. (Goddard v. Ordway, 94 U. S. 672.) If an execution is improperly issued where there is a *supersedeas* the circuit court may on motion quash it (Stockton v. Bishop, 2 How. 74); but if the bond is filed after execution of the writ the court will not restore the party to his prior rights. (Board v. Gorman, 19 Wall. 661.) A judgment in a state court awarding a peremptory *mandamus* cannot be executed if defendant file a bond. (State v. Johnson, 29 La. Ann. 399; U. S. v. Columbian Ins. Co., 2 Cranch C. C. 266.)

Liability of surety.—The sureties become liable if judgment is affirmed in the circuit court, and they are not discharged, although the case is taken to the supreme court, and a new bond is given. (Babbitt v. Finn, 101 U. S. 7.) And if judgment is affirmed an action lies on the bond without first issuing execution against defendant (Babbitt v. Finn, 101 U. S. 7); but on the action there must be an allegation of a single breach denying each alternative, that the writ was not prosecuted with effect, nor did the plaintiff in error answer the damages and costs, which must be specially set forth. (Tucker v. Lee, 3 Cranch C. C. 684; Bank v. Swann, 4 Cranch C. C. 139.) Interest on the penalty from the time of demand may be recovered. (Ives v. Merchants' Bank, 12 How. 159.) Under this section the damages recoverable on an appeal bond are such only as result from the delay in the sale of the property, and does not include accumulated interest. (Supervisors v. Kennicott, 103 U. S. 554.) Sureties on an appeal bond will be protected when they have acted in good faith. (Baylis v. L. M. & B. R. Co., 9 Biss. 90.)

§ 534. No bond required of United States.—Whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues from or is brought up to the supreme court, or a circuit court, either by the United States or by direction of any department of the government, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted. (Rev. Stats., sec. 1001.)

Note.—No bond in suing out an attachment need be given by the United States. (U. S. v. Ottman, 21 Int. Rev. Rec. 294.)

§ 535. Writs of error to district courts acting as circuit courts.—Writs of error shall be prosecuted from the final judgments of district courts acting as circuit courts to the supreme court in the same manner as from the final judgments of circuit courts. (Rev. Stats., sec. 1002.)

§ 536. Writs of error to state courts.—Writs of error from the supreme court to a state court, in cases authorized by law, shall be issued in the same manner, and under the same

regulations, and shall have the effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States. (Rev. Stats., sec. 1003.)

Error to state courts.—A writ of error will not be allowed on application of an attorney not acting for appellant directly (*Ex parte Dorr*, 3 How. 103); and it must be brought in the name of the claimant who appeared to defend the action (*The Burns*, 9 Wall. 237); and issues under "regulations" of the United States courts (*Buell v. Van Ness*, 8 Wheat. 312); and be allowed by the circuit judge, and bear the seal of the court and signature of the clerk. (*Buell v. Van Ness*, 8 Wheat. 312.) It need not on its face purport to be issued upon a final judgment of the highest court in the state, for it is the act of the court, and its object is to bring up the record, and cite the parties. (*Buell v. Van Ness*, 8 Wheat. 312.) A mistake in the date does not vitiate it (*O'Dowd v. Russell*, 14 Wall. 402); nor is it objectionable that it bears teste on the date of its issue. (*Atherton v. Fowler*, 91 U. S. 143.) As to the return of the writ, the law makes no distinction between criminal and civil cases. (*Worcester v. State*, 6 Peters, 515.) If the clerk omits to make return, a rule of court may require him to make return on the first day of the next term, or show cause or excuse for his neglect. (*U. S. v. Booth*, 18 How. 476.) If the record is duly certified by the clerk of the state court, authenticated by seal of the court, and annexed to the writ, it is sufficient (*Martin v. Hunter*, 1 Wheat. 304; *Worcester v. State*, 6 Peters, 515), although the certificate of the judge is not appended (*Worcester v. State*, 6 Peters, 515), if it contains the judgment duly certified, over which the supreme court can exercise jurisdiction. (*Webster v. Reid*, 11 How. 437.)

§ 537. Writs of error returnable to the supreme court.—Writs of error returnable to the supreme court may be issued as well by the clerks of the circuit courts, under the seals

thereof, as by the clerk of the supreme court. When so issued they shall be, as nearly as each case may admit, agreeable to the form of a writ of error transmitted to the clerks of the several circuit courts by the clerk of the supreme court, in pursuance of section nine of the act of May eight, seventeen hundred and ninety-two, chapter thirty-six. (Rev. Stats., sec. 1004.)

Return of writ.—The writ of error is the writ of the supreme court (*Mussina v. Cavazos*, 6 Wall. 355); and a clerk of the circuit court has no right to change its form without consent of the supreme court justices. (*Barton v. Forsyth*, 5 Wall. 590.) It need not be allowed by any judge; that it is issued and served by copy is sufficient. (*Davidson v. Lanier*, 4 Wall. 447.) When issued to the supreme court of a territory, it may be issued by the clerk of the territorial court. (*Sheppard v. Wilson*, 5 How. 210.) Prior to the adoption of this section a clerk of the circuit court could not issue the writ. (*West v. Barnes*, 2 Dall. 401.)

§ 538. Amendment of writ of error.—The supreme court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form; *provided*, the defect has not prejudiced, and the

amenament will not injure, the defendant in error. (Rev. Stats., sec. 1005.)

Amendment.—Before the adoption of this section a writ of error could not be amended. (*Insurance Co. v. Mordecai*, 21 How. 195; *Porter v. Foley*, 21 How. 393; *Hodge v. Williams*, 22 How. 87; *Washington v. Dennison*, 6 Wall. 495.) The right to amend under this section is not absolute, but is within the discretion of the court (*Pearson v. Yewdall*, 85 U. S. 294); and where the record presents no question which has not been previously decided, leave to amend will not be granted. (*Pearson v. Yewdall*, 95 U. S. 294.) A writ of error without a seal is void. (*Washington v. Dennison*, 6 Wall. 495.) If the writ is not tested as of a preceding term the teste may be amended by the record of duration of that term (*Course v. Stead*, 4 Dall. 22); but the mere fact that it is dated before the entry of the judgment will not vitiate it if served after that time. (*O'Dowd v. Russell*, 14 Wall. 402.) If there is sufficient in the record to amend by, an omission may be amended. (*Course v. Stead*, 4 Dall. 22.) So if the names of parties are not set forth in the writ (*Deneale v. Shimp*, 8 Peters, 526), or if an appeal is taken in the name of the firm instead of the name of the individual member of the firm. (*Moore v. Simonds*, 100 U. S. 145.) If the writ is made returnable on the wrong day (*National Bk. v. Bank of Commerce*, 99 U. S. 608; *Hampton v. Rouse*, 15 Wall. 684), or the day is described imperfectly (*McVeigh v. U. S.*, 8 Wall. 640), or left blank (*Mossman v. Higginson*, 4 Dall. 12), it may be amended by inserting the proper return day (*Atherton v. Fowler*, 91 U. S. 143); and a new citation will be issued. (*National Bk. v. Bank of Commerce*, 99 U. S. 608; *Dayton v. Lash*, 94 U. S. 112.) Where the record shows who are the members of the partnership, and an appeal has been taken in the name of the firm, the defect may be cured by amendment. (*Moore v. Simonds*, 100 U. S. 145.) A paper purporting to be a writ of error, but not being such, is not susceptible of amendment under this section. (*Bondurant v. Watson*, 103 U. S. 281.) Under section 1005 of the Revised Statutes, being section 3 of the Act of June 1, 1872 (chap. 255,

17 Stat. at L. 196), this court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error "when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record," "provided the defect has not prejudiced, and the amendment will not injure, the defendant in error." (*Estes v. Trabue*, 128 U. S. 225.) In *Moore v. Simonds*, 100 U. S. 145, 25 L. ed. 590, an appeal was taken in the name of a firm, but it was taken when section 1005 was in force. This court said: "We are clear, therefore, that the defect is one that may be amended under the law as it now stands, and for this reason we will not dismiss the appeal." (*Estes v. Trabue*, 128 U. S. 225.)

§ 539. Amendments in prize appeals.

—The supreme court may, if, in its judgment, the purposes of justice require it, allow any amendment, either in form or substance, of any appeal in prize causes. [See sec. 4636.] (Rev. Stats., sec. 1006.)

Note.—An appeal may be allowed whenever the purposes of justice require it. (*La Nuestra Senora de Regla*, 17 Wall. 29.)

§ 540. Supersedeas.—In any case where a writ of error may be a *supersedeas*, the defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation. But if he desires to stay process on the judgment, he may, having served his writ of error as afore-

said, give the security required by law within sixty days after the rendition of such judgment, or afterward with the permission of a justice or judge of the appellate court. And in such cases where a writ of error may be a *superse-deas*, executions shall not issue until the expiration of ten days. (Rev. Stats., sec. 1007.)

18 U. S. Stat. 318; 1 Sup. Rev. Stats. 138.

Supersedeas.—A writ of error served after the return day is void (Wood v. Lide, 4 Cranch, 180), and if sued out after expiration of the sixty days it cannot operate as a *supersedeas*. (Goundy v. Young, 1 Cranch C. C. 443; Hogan v. Ross, 11 How. 294; Saltmarsh v. Tuthill, 12 How. 337.) So if informal it ceases to operate as a *supersedeas*. (Hogan v. Ross, 11 How. 294.) The *supersedeas* is a statutory remedy, and can only be obtained by a strict compliance with the statute. (Sage v. Central R. R. Co., 93 U. S. 412.) The writ will not operate as a *supersedeas* unless sued out and a copy filed in the clerk's office. (Moore v. Dunlap, 1 Cranch C. C. 180; Ex parte Ben, 1 Cranch C. C. 532; Railroad Co. v. Harris, 7 Wall. 574; O'Dowd v. Russell, 14 Wall. 402; Kitchen v. Randolph, 93 U. S. 86; *contra*, Telegraph Co. v. Eyser, 19 Wall. 419.) Such service as is required on writ of error is not required in case of appeal. (Bigler v. Waller, 12 Wall. 142.) Where the appeal is improperly refused, judgment on a *mandamus* may direct that the security for a *supersedeas* be accepted as of the date of the appeal. (Ex parte Railroad Co., 95 U. S. 221.) And an appeal subsequently allowed vacates all acts done before its allowance. (Thornhill v. Bank, 1 Am. L. T. 245.) If the approval of a *supersedeas* bond is obtained by fraud it may be vacated (Railroad Co. v. Schutte, 100 U. S. 644), and no new bond will be taken. (Railroad Co. v. Schutte, 100 U. S. 644.) Under the Judiciary Act of 1789 and the Act of 1803, an appeal or writ of error, to operate as a *supersedeas*, must be taken and security given within ten days after the rendition of the judgment or decree. (Adams v. Law, 16 How. 144; Hudgins v. Kent, 18 How. 530; Silsby v. Foot, 20 How.

290; *Washington v. Dennison*, 6 Wall. 495; *Patterson v. De La Ronde*, 8 Wall. 293; *Washington etc. R. R. Co. v. Bradley*, 7 Wall. 675.) Nor could the circuit court award a *supersedeas* unless the writ of error is taken within such time. (*Hogan v. Ross*, 11 How. 294.) Under Rev. Stat., sec. 1007, as amended by 18 Stat. at L. 318, a *supersedeas* cannot be allowed where an appeal was not taken or a writ of error sued out and served within sixty days, Sundays exclusive, after judgment. (*Kitchen v. Randolph*, 93 U. S. 86; *Sage v. Central R. Co.*, Id. 412; *Rodd v. Heartt*, 17 Wall. 354; *Texas & P. R. Co. v. Murphy*, 111 U. S. 488; *Wurts v. Hoagland*, 105 U. S. 701; *Peugh v. Davis*, 110 U. S. 227.) To make a *nunc pro tunc* order for a *supersedeas* effectual, it must appear that the delay was the act of the court, and that injustice will not be done. (*Sage v. Central R. R. Co.*, 93 U. S. 412.) The service of the writ of error must be within sixty days, "Sundays excluded," and security must be given "within sixty days" after the rendition of such judgment, or afterward by special permission. This can only mean that he may give the security and so obtain the *supersedeas* within the same sixty days which is allowed him to serve the writ. (*Town of Danville v. Brown*, 128 U. S. 503.) This section does not apply to judgments in the highest court of a state. (*Foster v. Kansas*, 112 U. S. 201.) It refers only to judgments and decrees in the courts of the United States, and not to state courts. (*Doyle v. Wisconsin*, 94 U. S. 50; *Foster v. Kansas*, 112 U. S. 201.) A *supersedeas*, in order to stay proceedings on an execution, must come before a levy is made. (*Boyle v. Zacharie*, 6 Pet. 648.)

Time to file security.—Time is an essential element which cannot be disregarded, and to make a *nunc pro tunc* order effectual it must appear that the delay was the fault of the court, and not of the parties. (*Sage v. Central R. Co.*, 93 U. S. 412.) Where the security of a *supersedeas* bond becomes impaired, the supreme court will order and adjudge it to be made sufficient by additional security. (*Williams v. Claffin*, 103 U. S. 753; *Jerome v. McCarter*, 21 Wall. 17.) The time begins to run from the announcement of the decision although the record is not signed till next day. (*Board v. Gorman*, 19 Wall. 661.) The right

of appeal is determined by the entry of the final decree although entered as of a prior date (Rubber Co. v. Goodyear, 5 Wall. 153); but not till the actual filing of the decree (Seymour v. Freer, 5 Wall. 822); so a judgment is not final till it is entered in the court. (Green v. Van Buskirk, 3 Wall. 448.) So the time begins to run from entry of the decree although it provides for the taxation of costs, which are not taxed till after the time allowed for an appeal (The Hartford, 1 McAll. 91); but if the court entertains a motion to open the decree the time does not begin to run until the motion is disposed of. (Brockett v. Brockett, 2 How. 238; Railroad Co. v. Bradleys, 7 Wall. 575; Memphis v. Brown, 94 U. S. 715.) Although the writ is served before the expiration of the sixty days, yet if not sealed till after that time it cannot operate as a *supersedeas*. (Washington v. Dennison, 6 Wall. 495.) An appeal taken after sixty days cannot be allowed *nunc pro tunc*. (Sage v. Central R. R. Co., 93 U. S. 412; The Roanoke, 3 Blatchf. 390.) Where a motion for a new trial is filed the time begins to run from the day it is overruled. (Rutherford v. Penn. Mut. L. Ins. Co., 1 Fed. Rep. 456; see Hatch v. Coddington, 5 Blatchf. 523.) The circuit court, during the term, may strike out and enter a judgment anew for the purpose of allowing a writ of error to operate as a *supersedeas* (Memphis v. Brown, 94 U. S. 115), but if it is improperly awarded the motion should be to discharge the order (Hudgins v. Kemp, 18 How. 550); and although an order has all the requisites of a decree, yet if followed by a decree the appeal will be regarded as taken from the latter (Rubber Co. v. Goodyear, 6 Wall. 153), and if it refers the case to a commissioner and another decree is entered, the time runs from either decree. (Rodd v. Heartt, 17 Wall. 354.) If an intervenor moves to set aside a decree the motion does not suspend the decree. (Sage v. Central R. R. Co., 93 U. S. 412.) Under section 11 of the act of June 1, 1872, the *supersedeas* bond may be executed and a *supersedeas* obtained within sixty days after the rendition of the judgment, and later with the permission of the designated judge. (Western U. Telegraph Co., v. Eyser, 18 Wall. 419; Boise County v. Gorman, 19 Wall. 661; see United States v. Addison, 22 How. 174; Stockton v. Bishop, 2 How. 74.)

Writ of error.—A writ of error becomes a *supersedeas per se* where the party suing it out complies with the statute. (Tiernan v. Booth, 9 Biss. 499.) It will operate as a *supersedeas* if duly served within sixty days, Sundays exclusive, after motion for new trial overruled. (Rutherford v. Penn. Mut. L. Ins. Co., 1 Fed. Rep. 456; Tiernan v. Booth, 4 Fed. Rep. 620; Arnold v. Frost, 9 Ben. 267.) If the writ of error is too late to operate as a *supersedeas* the supreme court will not quash a writ of possession issued to enforce the decree. (Walleu v. Williams, 7 Cranch, 278.) The court will not grant a writ of possession where there was a mere technical defect in the *supersedeas*. (Tiernan v. Booth, 9 Biss. 499.) The circuit court has no power to stay the execution on the ground of mistake (Saltmarsh v. Tuthill, 12 How. 387); and there is nothing to prevent the clerk to prove an execution before the sixty days; but it cannot be issued before the expiration of the the sixty days. (Board v. Gorman, 19 Wall. 661; Ex parte Dunn, 6 Rich., N. S., 307.) The prohibition of the issuance of execution until after a certain time refers only to judgments and decrees of federal courts. (Doyle v. Wisconsin, 94 U. S. 50.) Although the bond is filed within the sixty days, yet the writ will not operate as a *supersedeas* unless a copy thereof is lodged in the clerk's office within sixty days (Railroad Co. v. Harris, 7 Wall. 574; see Thornhill v. Bank, 4 Am. L. T., N. S., 245; Thompson v. Voss, 1 Cranch C. C. 108; Adams v. Law, 16 How. 144); but if the district court extends the time for giving the bond, when taken it relates back to the time of taking the appeal (Dutcher v. Woodhull, 7 Ben. 313); and if the writ of error is sued out and served within the sixty days the required security may be given after the service. (Kitchen v. Randolph, 93 U. S. 86.) The service of the writ of error or the perfection of the appeal within sixty days is an indispensable prerequisite to a *supersedeas*, and no stay of process can be granted on the judgment if this is not done. (Kitchen v. Randolph, 93 U. S. 86; Sage v. Central R. R. Co., 93 U. S. 412.) A bond filed on the taking of an appeal in an action at law cannot operate as a *supersedeas* (Saltmarsh v. Tuthill, 2 How. 387); and if no bond is filed to stay execution of the decree appellant cannot complain on account of its enforcement. (Scoutter v. La Crosse

Railroad, 1 Woolw. 80.) Where a petition is filed for a rehearing in the state court, the granting of a writ of error and the filing of the bond within sixty days will operate as a *supersedeas*. (Slaughter House Cases, 10 Wall. 273.) Where the decree is special, and its terms are to be subsequently settled, the appellant may file the bond within sixty days after entry of the decision, or within sixty days after the entry of the decree (Silsby v. Foote, 20 How. 290); and if he does not give the bond within sixty days he may nevertheless sue out his writ of error or take his appeal at any time within two years upon giving security to cover the costs. (Saltmarsh v. Tuthill, 12 How. 387; Hudgins v. Kemp, 18 How. 530; The Roanoke, 3 Blatchf. 590.) After acceptance of a bond in awarding a *supersedeas* the jurisdiction of the lower court ceases and it attaches here, and the lower court cannot make an order requiring additional security. (Keyser v. Farr, 105 U. S. 265.)

§ 541. Writs of error and appeals to supreme court, time for taking.—No judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in the supreme court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order; *provided*, that where a party entitled to prosecute a writ of error or to take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within two years after the judgment, decree, or order, exclusive of the term of such disability. [See sec. 635.] (Rev. Stats., sec. 1008.)

Within what time.—A writ of error (Gelson v. Hoyt, 3 Wheat. 246; Brooks v. Norris, 11 How. 204) or an ap-

peal (U. S. v. Pacheco, 20 How. 261) and the security must be furnished within the two years, or the court may disallow the appeal; but if the appeal was allowed within the two years, the court may accept the security after that time and allow the appeal *nunc pro tunc*. (Brandies v. Cochrane, 13 Fed. Rep. 142, notes; The Dos Hermanos, 10 Wheat. 306.) The limitation prescribed by this section does not apply to writs of error *coram nobis*. (Strode v. The Stafford Justices, 1 Brock. 162.) If an opinion is filed containing directions for a decree there is no decree until it is filed, and if subsequently amended the last is the final decree. (U. S. v. Gomez, 1 Wall. 690; McGarrahan v. Maxwell, 28 Cal. 75.) If a motion for new trial is not filed during the term when judgment was rendered, the time notwithstanding runs from the entry of the judgment. (Cambuston v. U. S., 95 U. S. 285.) The period of the rebellion is not to be included in determining whether writ has been sued out within the proper time. (The Protector, 9 Wall. 687.) If a writ of error is barred by the statute the objection may be made by motion. (Brooks v. Norris, 11 How. 204; see Chapman v. Barney, 129 U. S. 677.)

§ 542. **Appeals in prize causes, within what time.**—Appeals in prize causes shall be made within thirty days after the rendering of the decree appealed from, unless the court previously extends the time, for cause shown in the particular case; *provided*, that the supreme court may, if in its judgment the purposes of justice require it, allow an appeal in any prize cause, if it appears that any notice of appeal, or of intention to appeal, was filed with the clerk of the district court within thirty days next after the rendition of the final decree therein. [See secs. 695, 4636.] (Rev. Stats., sec. 1009.)

Note.—Where notice of appeal or of intention to appeal was filed in the district court within thirty days next after final decree, an appeal will be allowed when justice requires it. (*La Nuestra Senora de Regla*, 17 Wall. 29.)

§ 543. **Damages and costs on affirmance in error.**—Where, upon a writ of error, judgment is affirmed in the supreme court or a circuit court, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion. (Rev. Stats., sec. 1010.)

Note.—This section applies to decrees in equity as well as to judgments at law. (*Perkins v. Fourniquet*, 14 How. 328.)

Damages for delay.—There can be no allowance for damages but for the delay. (*Cotton v. Wallace*, 3 Dall. 302.) If the principle involved in the case was controverted at the time the writ of error was sued out, damages will not be allowed (*McKee v. Rains*, 10 Wall. 22); but if every question involved had been settled, damages for delay will be allowed. (*Pennyart v. Eaton*, 15 Wall. 380.) When the writ is sued out merely for delay, damages at the rate of ten per cent on the judgment from its date will be allowed (*Barrow v. Hill*, 13 How. 54; *Kilbourne v. State Sav. Inst.*, 22 How. 503; *Sutton v. Bancroft*, 23 How. 320; *Jenkins v. Banning*, 23 How. 435; *Prentice v. Peckersgill*, 6 Wall. 511; *Insurance Co. v. Huchberger*, 12 Wall. 164; *Hennessy v. Sheldon*, 12 Wall. 440; *Hall v. Jordan*, 19 Wall. 271); but not more than ten per cent; yet less may be given. (*West Wis. R. R. Co. v. Foley*, 94 U. S. 100.) Where money in hands of a marshal is stopped by a third person, no increase of damages will be allowed. (*The Perseverance*, 3 Dall. 336.) Damages for delay are not allowed on affirmance of a decree in admiralty (*The Douro*, 3 Wall. 564), and the allowance of interest on the affirmance of a decree in admiralty is not an incident, but lies in the discretion of the court. (*Hemmaway v. Fisher*,

20 How. 455.) When a judgment is affirmed, interest will be allowed from the date of its rendition in the circuit court. (*Brown v. Van Braam*, 3 Dall. 344; *Bank v. Wistar*, 3 Peters, 431; *Mitchell v. Harmony*, 13 How. 116; *Perkins v. Fourniquet*, 14 How. 328; *Hemmaway v. Fisher*, 20 How. 455.) The amount of the bond on granting a *supersedeas* is to be determined by the circuit court under the laws and rules of the supreme court. (*U. S. v. New Orleans*, 8 Fed. Rep. 112.)

§ 544. Reversal on error limited.—

There shall be no reversal in the supreme court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact. (Rev. Stats., sec. 1011.)

18 U. S. Stat. 316; 1 Sup. Rev. Stats. 139.

Note.—If the circuit court sustains a plea in abatement the judgment cannot be reversed on error. (*Piquignot v. Pennsylvania R. R. Co.*, 16 How. 104; see *Stafford v. Union Bank*, 16 How. 135.)

§ 545. Appeals from circuit courts to supreme court.—Appeals from the circuit courts and districts courts acting as circuit courts, and from district courts in prize causes, shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error. (Rev. Stats., sec. 1012.)

Appeal, rules, and regulations.—The supreme court has no power to receive an appeal in any other mode than that provided by law (*Villabolas v. U. S.*, 6 How. 81; *U. S. v. Moore*, 11 Fed. Rep. 248), nor to dispense with or modify them. (*U. S. v. Curry*, 6 How. 106.) The

rules, regulations, and restrictions as to time within which the writ of error may be brought, and when it shall operate as a *supersedeas*, the citation, the security to be given, and the restrictions upon the appellate court as to reversal are all applicable. (The San Pedro, 2 Wheat. 132.) The law does not require an appeal to be made in open court; it may be made in vacation, and the form in which it is taken is immaterial. (Hudgins v. Kemp, 18 How. 530.) An entry on the minutes is not necessary; the certificate of the clerk of the facts is all that is required. (Hudgins v. Kemp, 18 How. 530.) And where an appeal bond is filed, the record may be amended *nunc pro tunc* to show an appeal taken. (Nicholson v. Chicago, 5 Biss. 89.) Appeals entered at the succeeding term will be dismissed. (In re McEven, 9 Biss. 368.) A cross-appeal must be prosecuted like any other appeal. (Wenslow v. Wilcox, 4 Morr. Trans. 394.) If the decree is joint all the defendants must join, unless there is a severance (Owings v. Kincannon, 7 Peters, 399; Missina v. Cavazos, 20 How. 280; Masterson v. Herndon, 10 Wall. 416); but one of them may prosecute, although the others abandon it (Todd v. Daniel, 16 Peters, 521); and any one holding a distinct interest may appeal. (Forgay v. Conrad, 6 How. 201.)

Application and allowance.—An appeal is a matter of right, and no petition is necessary. (U. S. v. Curry, 6 How. 106.) A petition praying for an appeal does not operate to remove the cause, unless accompanied by an allowance of the appeal by the court (Yeaton v. Lenox, 7 Pet. 220; Barrell v. Transportation Co., 3 Wall. 424; Pierce v. Cox, 9 Wall. 786); and if no appeal lies the court may refuse to allow it (The Pueblo, 4 Saw. 553); but when allowed the circuit court cannot afterwards set aside the order allowing it. (McGarrahan v. The New Idria Min. Co., 49 Cal. 331.) Whoever can sign a citation may allow the appeal. (Sage v. Railroad Co., 96 U. S. 712.) The order allowing an appeal may at the request of appellant be set aside at any time during the term. (Goddard v. Ordway, 101 U. S. 745.) There is no provision in the statute for the form of allowance; the acceptance of security followed when necessarily signing a citation is in legal effect an allowance of the appeal.

(Sage v. Railroad Co., 96 U. S. 712; Brandies v. Cochrane, 105 U. S. 262; S. C., 13 Fed. Rep. 142.) Where the claim and bond were sufficient a motion to dismiss will be denied (Scruggs v. Viser, 13 Fed. Rep. 304, note); and it may be inferred that the appeal was allowed, although the allowance does not appear on the record (Railroad Co. v. Bradleys, 7 Wall. 575); but the mere approval of the bond during the term is not sufficient. (Vansant v. Gaslight Co., 99 U. S. 213.) If allowed in open court during the term the allowance should be entered on the minutes. (Vansant v. Gaslight Co., 99 U. S. 213.)

The citation.—A citation to the opposite party to appear is necessary (Villabolas v. U. S., 6 How. 81; U. S. v. Curry, 6 How. 106; Garrison v. Cass Co., 5 Wall. 823; Alviso v. U. S., 5 Wall. 824; Railroad Co. v. Blair, 100 U. S. 661); but if an appeal is taken in open court at the same term at which the decree is entered, no citation is necessary (Reilly v. Lamar, 2 Cranch, 344; The San Pedro, 2 Wheat. 132; Yeaton v. Lenox, 7 Pet. 220; Brockett v. Brockett, 2 How. 238; Villabolas v. U. S., 6 How. 81; U. S. v. Vigil, 10 Wall. 423; Wilmer v. Meek, 95 U. S. 252); but the record must show the appeal was allowed in open court (Vansant v. Gaslight Co., 99 U. S. 213); a citation should issue though the security is not taken till after the term (National Bank v. Omaha, 96 U. S. 737); and if the record shows that appellee had notice the citation is not indispensable, although the appeal is taken at a subsequent term. (U. S. v. Gomez, 1 Wall. 690.)

Second appeal.—If an appeal is dismissed for some informality the party may take a second appeal within the period allowed for an appeal (Yeaton v. Lenox, 8 Pet. 123; The Virginia v. West, 19 How. 182; U. S. v. Pacheco, 20 How. 261; Edmondson v. Bloomshire, 7 Wall. 306); but an order allowing a party to perfect an appeal is not the allowance of a second appeal. (U. S. v. Currey, 6 How. 106; Edmondson v. Bloomshire, 7 Wall. 306.) Second appeals are allowed to bring up proceedings subsequent to the mandate issued on a former appeal and not settled by the terms of the mandate (Hinckley v. Morton, 2 Fed. Rep. 323); but where the decree was entered in

exact accordance with the mandate, an appeal from the decree will be dismissed. (*Humphrey v. Baker*, 103 U. S. 736.) A party who has appealed, but whose appeal has been dismissed, can only be heard in support of the decree. (*Loudon v. Taxing District*, 104 U. S. 771.) If a copy of the transcript is not filed at the term next succeeding the appeal, a citation issued after that time without a second appeal is null. (*Castro v. U. S.*, 3 Wall. 46.)

§ 546. Where both parties appeal to the supreme court, one record sufficient. —

Where appeal is duly taken by both parties from the judgment or decree of a circuit or district court to the supreme court, a transcript of the record filed in the supreme court by either appellant may be used on both appeals, and both shall be heard thereon in the same manner as if records had been filed by the appellants in both cases. (Rev. Stats., sec. 1013.)

CHAPTER XXII.

CRIMINAL PROCEDURE.

- § 547. Offenders against the United States, how arrested, and how removed for trial.
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§ 547. Offenders against the United States, how arrested and removed for trial.—For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal

to the district where the trial is to be had.
[See sec. 879.] (Rev. Stats., sec. 1014.)

Note.—Section recited and referred to in *United States v. Jones*, 134 U. S. 483.

Authority of magistrates.—The power conferred by this section is common to any judge or justice of the peace (U. S., *Ex parte*, 26 Ala. 156; *Bagnall v. Ableman*, 4 Wis. 163); and a commissioner has all the powers of a justice of the peace or state magistrate in the arrest and commitment of offenders against United States laws (*Ex parte Kaime*, 10 N. Y. Leg. Obs. 257); and a district attorney has no authority to order the marshal not to execute a warrant issued by a commissioner. (U. S. v. *Scoggins*, 3 Woods, 529.) It is to be exercised according to such form and manner as the judge may see fit to adopt, agreeably to the usual mode adopted in the state. (*Bagnall v. Ableman*, 4 Wis. 163.) It was the intention to assimilate all proceedings for holding accused persons to answer for crime to the proceedings had for similar offenses in the state courts. (U. S. v. *Harden*, 10 Fed. Rep. 803; 4 Hughes, 455; U. S. v. *Rundlett*, 2 Curt. 41; U. S. v. *Horton's Securities*, 2 Dill. 94.) The term "mode of process" is synonymous with mode of proceeding, and includes the power to admit to bail. (U. S. v. *Rundlett*, 2 Curt. 41.) When a judge sits to hear a criminal charge and commit for trial, he acts as a judge and not as a court. (U. S. v. *Clarke*, 1 Gall. 497.)

Issuance of warrant.—It is the duty of the magistrate to award a warrant whenever complaint is made to him on oath that a crime has been committed, whether applied for by the district attorney or any other person (U. S. v. *Skinner*, 2 Wheel. C. C. 232); but the oath of the complainant is necessary (U. S. v. *Mackenzie*, 1 N. Y. Leg. Obs. 227); and the party who makes the oath must have personal knowledge of the commission of the offense (U. S. v. *Burr*, 2 Wheel. C. C. 573; *In re Commissioners*, 3 Woods, 502); but a court may issue a warrant upon probable cause supported by oath. (U. S. v. *Bollman*, 1

Cranch C. C. 373.) If the signature of a magistrate is in pencil the warrant is void. (U. S. v. Thompson, 2 Cranch C. C. 409.) A warrant will not issue to arrest an officer while his conduct is under investigation by a naval court of inquiry regularly organized. (U. S. v. Mackenzie, 1 N. Y. Leg. Obs. 227.) A party arrested in a civil action for damages for conversion, who is already held to bail on criminal charges growing out of the same transaction, is entitled to a reduction in the amount of bail. (Smith v. Lee, 13 Fed. Rep. 28.) As to arrest in civil actions, see U. S. v. Griswold, 11 Fed. Rep. 807; S. C., 6 Saw. 255.

Preliminary proceedings.—A magistrate is not generally bound to investigate charges known to the district attorney, and which he declines to prosecute. (U. S. v. Mackenzie, 1 N. Y. Leg. Obs. 227.) A marshal who has arrested a person may take him before a justice of the peace to be admitted to bail (U. S. v. Milburn, 4 Cranch C. C. 478); and a commitment for examination should not exceed twenty-four hours unless special cause is shown, except at the request of the accused. (U. S. v. Worms, 4 Blatchf. 332.) A commissioner has no authority to bail the offender if the state magistrates have no such power (U. S. v. Case, 8 Blatchf. 250); but otherwise, if the state magistrates have such power. (U. S. v. Rundlett, 2 Curt. 41; U. S. v. Horton's Securities, 2 Dill. 94.) The material parts of a recognizance to appear, and of its condition, should be set forth in the body of it so as to admit of extension consistently with its terms (Dillingham v. U. S., 2 Wash. C. C. 422.) And it is essential that the party recognized to appear should be solemnly warned to appear before default is entered. (Dillingham v. U. S., 2 Wash. C. C. 422.) A commissioner may order an adjournment to a more convenient place, and this power includes adjournments as to time and place (U. S. v. Rundlett, 2 Curt. 41); and if the accused is under bail to appear at an adjourned day, a second adjournment cannot be made until he appears or is legally put in default. (U. S. v. Rundlett, 2 Curt. 41.) An arrest for trial may be made, to be followed by imprisonment if no bail is taken, or by bail, though punishment may be by fine alone. (In re Jackson, 14 Blatchf. 245.) This section does not apply to an arrest

made for the purpose of extradition. (In re Henrich, 5 Blatchf. 114.)

Preliminary examination.—A commissioner for the purposes of a preliminary examination has only the power and authority of a committing magistrate, and he must proceed “agreeably to the usual mode of process against offenders” before state magistrates (In re Martin, 5 Blatchf. 303; U. S. v. Walker, 6 Pittsb. L. J. 137); and he may be directed to certify the proceedings into the court, that it may be there considered (U. S. v. Berry, 4 Fed. Rep. 779; S. C., 28 Int. Rev. Rec. 405; 2 McCrary, 58); and if the magistrate takes money from the person of the accused, a summary order for its return may issue from the court. (Ex parte Craig, 4 Wash. C. C. 410.) The accused may at the hearing be represented by counsel. (U. S. v. Bollman, 1 Cranch C. C. 373.) Witness for the accused present at the commission of the offense may be examined to explain what is said by the witnesses for the prosecution (U. S. v. White, 2 Wash. C. C. 29); but a magistrate cannot issue process into another state to summon witnesses for the accused. (U. S. v. White, 2 Wash. C. C. 29.) The district attorney may appear to attend to the presentation of evidence, as counsel for the government, and he cannot dismiss the proceedings. (U. S. v. Schumann, 2 Abb. C. C. 523.) Witnesses for the prosecution cannot be examined (U. S. v. White, 2 Wash. C. C. 29; U. S. v. Burr, 1 Burr’s Trial, 177); nor can their character be impeached. (U. S. v. Walker, 6 Pittsb. L. J. 37.) Witnesses for accused are not generally examined on an application to bind him over to answer a criminal charge. (U. S. v. White, 2 Wash. C. C. 29.) The preliminary examination is to take place in the district where the offender is found without regard to where the offense was committed (Anonymous, 1 Woolw. 422); and the prisoner should be brought before the officer to establish his identity, as the finding in another district established nothing as to his identity. (Anonymous, 1 Woolw. 422; Bagnall v. Ableman, 4 Wis. 163.)

Commitment.—If the indictment contains inconsistent allegations and charges an impossible crime, the accused

will be discharged (U. S. v. Pope, 24 Int. Rev. Rec. 29); but if discharged he may be again arrested. The action of the commissioner is not final as to the commitment or discharge of the prisoner. (In re Martin, 5 Blatchf. 303; U. S. v. Burr, 1 Burr's Trial, 79.) A certified copy of an information which was not filed upon cause shown is not sufficient evidence to justify a commitment. (U. S. v. Shepard, 1 Abb. C. C. 431.) The presence of witnesses ought to be obtained. (U. S. v. Burr, 1 Burr's Trial, 97.) And an affidavit made before one commissioner is admissible before another. (Ex parte Bollman, 4 Cranch, 75; S. C., 1 Cranch C. C. 373; U. S. v. Burr, 1 Burr's Trial, 97.) The court may commit the prisoner for trial although the grand jury is in session, and the order does not cease on the assembling of the grand jury. (U. S. v. Burr, 1 Burr's Trial, 97.) If the sessions of the court are interrupted by rebellion, the prisoner cannot be committed for an indefinite time. (U. S. v. Greiner, 4 Phila. 396.) To warrant a commitment the fact of the commission of an offense may be proved by the confession of the prisoner. (U. S. v. Bloomgart, 2 Ben. 356.) Probable cause must be shown to justify a commitment, and probable cause must be made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged. (In re Martin, 5 Blatchf. 303; U. S. v. Lumsden, 1 Bond, 5; U. S. v. Burr, 1 Burr's Trial, 11; In re Van Campen, 2 Ben. 419.) And a certified copy of an indictment if uncontradicted is sufficient proof of probable cause. (In re Clark, 2 Ben. 540; In re Alexander, 1 Low. 530; U. S. v. Haskins, 3 Sawy. 262.) Although the indictment is quashed the court may commit to await a new indictment. (U. S. v. To-wan-ga-ca, Hemp. 299.)

Warrant of commitment.—A warrant of commitment must be under seal (Ex parte Sprout, 1 Cranch C. C. 424; Ex parte Bennett, 2 Cranch C. C. 612); it must show sufficient cause on its face (Ex parte Bennett, 2 Cranch C. C. 612; U. S. v. Brown, 4 Cranch C. C. 333; Ex parte Williams, 4 Cranch C. C. 343), and must state some good cause certain supported by oath (Ex parte Buford, 1 Cranch C. C. 276; S. C., 3 Cranch, 448; Ex parte Sprout, 1 Cranch C. C. 424; Ex parte Bennett, 2 Cranch C. C. 612); and fix the time

for imprisonment. (*Ex parte Sprout*, 1 Cranch C. C. 424.) A commitment written on the back of the warrant is not sufficient unless it charges a crime. (*U. S. v. Brown*, 4 Cranch C. C. 333.) The marshal is liable in a case where the judge had no jurisdiction or authority to issue the same. (*Bagnall v. Ableman*, 4 Wis. 163.) It is an offense to obstruct, oppose, or resist the United States marshal while executing or attempting to execute any lawful writ or process. (*U. S. v. Doyle*, 6 Saw. 612.)

Removal of prisoner to another district.—An offender against the laws of the United States may be removed into a district in a territory as well as in a state. (*U. S. v. Haskins*, 3 Saw. 262.) So a party arrested elsewhere may be removed into the District of Columbia for trial. (*In re Buell*, 3 Dill. 116.) A warrant for removal is authorized only where the offender has been arrested and committed for want of bail. (*U. S. v. Shepard*, 1 Abb. U. S. 431; *U. S. v. Jacobi*, 4 Am. L. T. (N. S.) 148.) He has a right to an examination, and to be let to bail. (*Bagnall v. Ableman*, 4 Wis. 163.) The indictment must be considered sufficient unless so defective that it would be the manifest duty of the court to decline to take jurisdiction (*In re Clark*, 2 Ben. 540); but a mere copy of the indictment is not sufficient if not sufficient under the state law. (*Bagnall v. Ableman*, 4 Wis. 163.) If it does not charge an offense triable in the district to which it is sought to be removed the judge may refuse to issue the warrant. (*In re Buell*, 3 Dill. 116.) Whether the indictment shows an offense may be examined into on application for the warrant of removal (*Ex parte Buell*, 3 Dill. 116), and if the prisoner is in custody of the marshal, he cannot be removed into the other district although there charged with a higher offense. (*U. S. v. Burr*, 2 Burr's Trial, 454; *U. S. v. Corrie*, 23 Law Rep. 145.) Where it appears that the act alleged does not constitute an offense against the United States, or that no trial can be had in the district to which the removal is sought, it is the duty of the judge to refuse the warrant. (*In re Doig*, 4 Fed. Rep. 193; *In re Buell*, 3 Dill. 116; *In re Clark*, 2 Ben. 540.) The power to order a removal rests on the judge, and the words "judge of

the district" may be held to include any judge of the district. (Anon., 1 Woolw. 422; U. S. v. Burr, 2 Burr's Trial, 451.) The judge of the district to whom application is made may review without a writ of *habeas corpus* the action of the committing magistrate, and may reduce the bail required by him. (U. S. v. Brawner, 7 Fed. Rep. 87.) Under this section, the judge of the United States district court is invested with plenary power to grant or refuse a warrant of removal of a party arrested and committed for crime for trial in another district. (United States v. Rogers, 23 Fed. Rep. 658.) The court has not only the right, but the duty, to look into the indictment so far as to be satisfied that an offense against the United States is charged, and that it is such an offense as may be lawfully tried in the forum to which the removal is asked. (U. S. v. Horner, 44 Fed. Rep. 677.)

§ 548. Bail admitted in cases not capital.—Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders. (Rev. Stats., sec. 1015.)

Removal of prisoner.—Judges of the district courts have no power to cause the arrest of a citizen of the state and district in which the judge resides, and order his removal to another state, to be there imprisoned until he obeys an order made in a civil case pending in the United States court in that state. (In re Graves, 29 Fed. Rep. 60.) This section does not apply to extradition cases. (In re Kaine, 10 N. Y. Leg. Obs. 257.) "Bail" means security taken for the appearance of the party accused at the time and place of trial (U. S. v. Case, 8 Blatchf. 250), and money cannot be taken in lieu thereof. (U. S. v. Case, 8 Blatchf. 250.) To require a larger bail than the prisoner can give is to require excessive bail, and to deny bail. (U. S. v. Lawrence, 4 Cranch C. C. 518.) The discretion of the magistrate must be guided by the consider-

ation of the ability of the prisoner to give bail, and of the atrocity of the crime. (U. S. v. Lawrence, 4 Cranch C. C. 518.) If the offense is indictable a corrupt notice cannot be imputed to the magistrate on account of the smallness of the bail. (U. S. v. Smith, 4 Cranch C. C. 727.) Under this section bail may be admitted by a circuit court commissioner upon all arrests in criminal cases where the offense is not punishable by death. (United States v. Jones, 134 U. S. 483.)

Recognizance.—A recognizance is sufficient if it sets out the act without any particulars (U. S. v. Dennis, 1 Bond, 103); but if it does not set out an act made an offense by act of Congress it is void. (U. S. v. Hand, 6 McLean, 274.) It is valid although the parties do not sign it (U. S. v. Pickett, 1 Bond, 123); but the signature of a person to the recognizance on a subsequent day does not make him a party to it if his name does not appear on the body of the instrument. (U. S. v. Pickett, 1 Bond, 123.) A single recognizance for a total amount is void where separate recognizances are required. (U. S. v. Goldstein, 1 Dill. 43.) A recognizance of bail in a criminal case is a means of compelling the party to submit to trial and punishment. (Ex parte Milburn, 9 Peters, 704.)

Admission to bail.—If a prisoner is sick, and his disease is such that confinement must be injurious and may be fatal, he may be admitted to bail (U. S. v. Jones, 3 Wash. C. C. 224); but the continuance of a cause alone is no ground for admission to bail. (U. S. v. Jones, 3 Wash. C. C. 224.) Although a party has forfeited his right to bail by absconding, yet he may be let to bail if there will be a delay in the trial (U. S. v. Lee, 6 Phila. 96); and on his subsequent appearance he may be required to give additional security (U. S. v. Feely, 1 Brook, 255); and a recognizance given after judgment on plea of guilty stricken out is binding on the sureties. (Bassett v. U. S., 9 Wall. 38.) A party absconding cannot after recapture demand to be admitted to bail as a matter of right. (U. S. v. Lee, 6 Phila. 96.) This court may admit to bail on the charge of high treason. (United States v. Hamilton, 3 Dall. 17; U. S. v. Stewart, 2 Dall. 343.)

Power to take bail.—The power to take bail is in the discretion of the court. (U. S. v. Burr, 1 Burr's Trial, 79.) So a commissioner has the same power as a state magistrate. (U. S. v. Horton's Securities, 2 Dill. 94.) And he may release a party on bail at any time before issuing the warrant for removal. (U. S. v. Volz, 14 Blatchf. 15.) A justice of the peace has no power to admit to bail after commitment. (U. S. v. Faw, 1 Cranch C. C. 486.) A clerk may take the acknowledgment, and justify the obligors to a bail bond (U. S. v. Evans, 2 Fed. Rep. 147; 2 Flip. 605); and a recognizance good as a common-law bond will be good as a statutory bond. (U. S. v. Evans, 2 Fed. Rep. 147; 2 Flip. 605.)

Liability.—A recognizance to appear from day to day is not discharged by quashing the indictment (U. S. v. White, 5 Cranch C. C. 360); but if accused appears at the next term, and the court passes away without taking any order respecting him, he is discharged. (U. S. v. Burr, 1 Burr's Trial, 79.) So an agreement to continue the case for an indefinite period discharges the bail. (Reeser v. U. S., 9 Wall. 13.) The accused must appear on the first day of the term (U. S. v. Hodgkin, 1 Cranch C. C. 510); and if he forfeits his recognizance a motion on arrest of judgment will not be heard till he appears and submits to the jurisdiction of the court (U. S. v. Askins, 1 Cranch C. C. 98; U. S. v. Erskine, 1 Cranch C. C. 199); and proceedings to enforce the default may be stayed to await his trial. (U. S. v. Feely, 1 Brock. 255.) The death of the principal after default will not exonerate the sureties. (U. S. v. Van Fossen, 1 Dill. 406.) Nor will his subsequent imprisonment and conviction under state laws exonerate the bail. (U. S. v. Van Fossen, 1 Dill. 406.)

§ 549. Bail admitted in capital cases.
—Bail may be admitted upon all arrests in criminal cases where the punishment may be death; but in such cases it shall be taken only by the supreme court or a circuit court, or by

a justice of the supreme court, a circuit judge, or a judge of a district court, who shall exercise their discretion therein, having regard to the nature and circumstance of the offense, and of the evidence, and to the usages of law. (Rev. Stats., sec. 1016.)

Note.—A person charged with treason may be admitted to bail (U. S. v. Hamilton, 3 Dall. 17; 1 Burr's Trial, 310); but not except under strong circumstances after indictment. (U. S. v. Stewart, 2 Dall. 343; 1 Burr's Trial, 310.) The sum should be sufficient to insure the appearance of the party, but not so great as to be oppressive. (1 Burr's Trial, 18, 104.)

§ 550. Bail in criminal cases removed from state courts.—When a writ of error is issued for the revision of the judgment of a state court, in any criminal proceeding where is drawn in question the validity of a statute of, or an authority exercised under, the United States, or where any title, right, privilege, or immunity is claimed under the constitution, or any statute of, or commission held or authority exercised under, the United States, the defendant, if charged with an offense that is bailable by the laws of such state, shall not be released from custody until a final judgment upon such writ, or until a bond, with sufficient sureties, in a reasonable sum, as ordered and approved by the state court, is given; and if the offense is not so bailable, until a final judgment upon the writ of error. [See sec. 709.] (Rev. Stats., sec. 1017.)

§ 551. Surrender of criminals by their bail.—Any party charged with a criminal offense and admitted to bail may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense; and at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and exoneratur of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law. (Rev. Stats., sec. 1018.)

§ 552. New bail to be given in certain cases.—When proof is made to any judge of the United States, or other magistrate having authority to commit on criminal charges as aforesaid, that a person previously admitted to bail on any such charge is about to abscond, and that his bail is insufficient, the judge or magistrate shall require such person to give better security, or, for default thereof, cause him to be committed to prison; and an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued, by such judge or magistrate, setting forth the cause thereof. (Rev. Stats., sec. 1019.)

§ 553. When penalty of recognizances may be remitted.—When any recognizance

in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced. (Rev. Stats., sec. 1020.)

Recognizance, relief of the surety.—Where there is no collusion the court has the power to relieve the surety from the penalty of the recognizance. (U. S. v. Duncan, 10 Pittsb. L. J. 41.) So if the bail produce the prisoner they may be released, although the delay may have been prejudicial to the government (U. S. v. Duncan, 10 Pittsb. L. J. 41); but the penalty of a forfeited recognizance will not be remitted upon the ground that the party when called was in custody of a state officer on a criminal charge. (U. S. v. Stricker, 12 Blatchf. 389.) If the trial for a misdemeanor proceeds after defendant has been called and defaulted and defendant is acquitted, the default may be set aside (U. S. v. Santos, 5 Blatchf. 104); but if there is good cause to believe accused is guilty, default will not be set aside. (U. S. v. Mercer, Deady, 502.) If judgment has been entered on the recognizance it may be set aside, and the recognizance respited upon production of the prisoner. (U. S. v. Duncan, 10 Pittsb. L. J. 41; see U. S. v. Cookendorfer, 5 Cranch C. C. 113.)

§ 554. Indictments.—No indictment shall be found, nor shall any presentment be made, without the concurrence of at least twelve grand jurors. (Rev. Stats., sec. 1021.)

§ 555. Offenses, how prosecuted.—All crimes and offenses committed against the pro-



vision of chapter seven, title "Crimes," which are not infamous, may be prosecuted either by indictment or by information filed by a district attorney. (Rev. Stats., sec. 1022.)

Offenses, how prosecuted. — Offenses not capital or infamous may, in the discretion of the court, be prosecuted by information (U. S. v. Sheppard, 1 Abb. 431; U. S. v. Maxwell, 3 Dill. 275; U. S. v. Block, 4 Saw. 211; U. S. v. Baugh, 1 Fed. Rep. 784; but see U. S. v. Joe, 4 Chic. L. N. 105), as mere misdemeanors. (U. S. v. Waller, 1 Saw. 701; U. S. v. Ebert, 1 Cent. L. J. 205.) The fact that an offense may or must be punished by imprisonment in the penitentiary does not necessarily make it infamous (U. S. v. Maxwell, 3 Dill. 275); and if a crime implies a total want of truth it is infamous, although only a misdemeanor (U. S. v. Block, 4 Saw. 211); but the species of *crimen falsi* is not infamous unless it injuriously affect the public administration of justice by falsehood and fraud. (U. S. v. Block, 4 Saw. 211.) The crimes which at common law rendered a person infamous were treason, felony, and *crimen falsi*. (U. S. v. Block, 4 Saw. 211.) The term "infamous," at common law, was applied to certain crimes upon the conviction of which a person was incompetent as a witness. (U. S. v. Block, 4 Saw. 211; U. S. v. Maxwell, 3 Dill. 275.) The following crimes have been held infamous, the conviction whereof was sufficient to disqualify a person as a witness: larceny (State v. Gardner, 1 Root, 485), or knowingly receiving stolen goods (Com. v. Rogers, 7 Met. 500; but see Com. v. Murphy, 3 Pac. C. L. J. 290), forgery (Poage v. State, 3 Ohio St. 229; State v. Candler, 3 Hawks, 393), and all crimes which create a violent presumption against the truthfulness of a party under oath. (Utley v. Merrick, 11 Met. 302.) It is not the character of the punishment but the nature of the act that makes a crime infamous. (U. S. v. Block, 4 Saw. 211); but offenses which are merely misdemeanors are not within the term "infamous." (U. S. v. Ebert, 1 Cent. L. J. 205.) This section does not preclude the prosecution by information of such other offenses as may be so prosecuted consistently with the constitution and

laws of the United States. (Ex parte Wilson, 114 U. S. 417; United States v. Petit, 114 U. S. 429.) In a prosecution in the federal courts under the United States election laws, where the offense charged is on the border-line of federal jurisdiction, it is the imperative duty of the court to require a clear and distinct averment of every fact essential to give the court jurisdiction. (United States v. Morrissey, 32 Fed. Rep. 147.)

§ 556. Form of indictment for perjury.—In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed. (Rev. Stats., sec. 5396.)

§ 557. Persons convicted of perjury incompetent witnesses.—Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written

testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states and subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (Rev. Stats., sec. 5392.)

§ 558. Indictment for subornation of.
—In every presentment or indictment for subornation of perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, and without setting forth the commission or authority of the court or person before whom the perjury was committed, or was agreed or promised to be committed. (Rev. Stats., sec. 5397.)

§ 559. Perjury before a court-martial.
—In prosecutions for perjury committed on examination before a naval general court-martial, or for the subornation thereof, it shall be sufficient to set forth the offense charged

on the defendant, without setting forth the authority by which the court was held, or the particular matters brought before, or intended to be brought before, said court. (Rev. Stats., sec. 1023.)

§ 560. Charges joined in one indictment.—When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated. (Rev. Stats., sec. 1024.)

Joinder of charges.—An indictment may contain several counts for offenses of the same class. (U. S. v. Bickford, 4 Blatchf. 337.) And several offenses arising out of the same transaction may be charged in one indictment (U. S. v. Jacoby, 12 Blatchf. 491), if the crimes are merely misdemeanors (U. S. v. Porter, 2 Cranch C. C. 60; U. S. v. Devlin, 6 Blatchf. 71); but the same count cannot charge a capital offense and another offense which is a misdemeanor. (U. S. v. Sharp, Peters C. C. 131.) Different counts may be joined in the same indictment if the judgment is the same for each offense (U. S. v. Goddard, 4 Cranch C. C. 444; U. S. v. Burns, 5 McLean, 23; U. S. v. Peterson, 1 Wood. & M. 305; U. S. v. Stetson, 3 Wood. & M. 164); and it may allege them to have been committed at different times and places. (U. S. v. Young, 14 Int. Rev. Rec. 148; U. S. v. O'Callahan, 6 McLean, 596.) The same offense may be charged in different ways in the same indictment in order to meet the facts of the case. (U. S.

v. Pirates, 5 Wheat. 184; U. S. v. Dickinson, 2 McLean, 325.) So a count for an assault and battery and a count for riot (U. S. v. McFarland, 1 Cranch C. C. 163); or a count for making false coin with counts for aiding and procuring false coins to be made (U. S. v. Burns, 5 McLean, 23); or for counterfeiting coins at different times and on different occasions (U. S. v. O'Callahan, 6 McLean, 596); or for a revolt and exciting a revolt (U. S. v. Peterson, 1 Wood. & M. 305); or for stealing letters received at the office from various points (U. S. v. Brent, 17 Int. Rev. Rec. 54); but a count for conspiracy cannot be joined with a count for murder in the same indictment (U. S. v. Scott, 4 Biss. 29); nor counts for knowingly transmitting false papers with counts for subornation of perjury. (U. S. v. Bickford, 4 Blatchf. 337.) The offenses of bigamy and adultery may be joined in one indictment, both at common law and under this section. (United States v. West (Utah), 27 Pac. Rep. 84.)

Practice.—Several persons cannot be charged jointly with an offense which is in its nature several. (U. S. v. Kazinski, 2 Sprague, 7.) The provisions of this section are obligatory, and all offenses and offenders that might have been joined previously must be joined now. (U. S. v. Kazinski, 2 Sprague, 7.) Where several offenses are charged and a general verdict is entered, judgment can only be entered for a single offense (U. S. v. Maguire, 3 Cent. L. J. 273); but if the prisoner is found guilty on several counts, he may be sentenced under one count, and the sentence on the other counts be suspended until the first sentence has been executed (U. S. v. Blaisdell, 3 Ben. 132); if sentenced under a cumulative judgment, it will be deemed valid in a collateral action. (Ex parte Peters, 4 Dill. 169.) If defendant has benefited by the joinder of offenses, his acquittal of some of the charges affords no grounds for a new trial. (U. S. v. Brent, 17 Int. Rev. Rec. 54.)

§ 561. Indictments, defect of form.—No indictment found and presented by a grand jury in any district or circuit or other court of

the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. (Rev. Stats., sec. 1025.)

Indictment, sufficiency of.—Mere mistakes in expressing the substance of a crime will be regarded as formal. (U. S. v. Jackson, 2 Fed. Rep. 522.) So an irregularity in summoning a grand jury is a mere matter of form. (U. S. v. Tuska, 14 Blatchf. 5.) So a defect in an indictment is cured if a criminal case is remitted from the district court to the circuit court for trial (U. S. v. McKie, 4 Dill. 1), although there is an imperfect and informal averment of an essential fact (U. S. v. Noelke, 1 Fed. Rep. 426; 17 Blatchf. 554); but an omission to state anything which is a part of the description of the crime will render an indictment defective. (U. S. v. Conant, 9 Cent. L. J. 129.) So if an indictment sets forth a paper by a description, instead of giving it *in hæc verba*, it is bad in motion in arrest of judgment. (U. S. v. Noelke, 1 Fed. Rep. 426; 17 Blatchf. 554.) This section governs on an application for a new trial in a federal court, although a different rule obtains in the state courts. (United States v. Molloy, 31 Fed. Rep. 19.) And a new trial cannot be granted for such defects of form although the record fails to show an arraignment and plea before the trial. (United States v. Molloy, 31 Fed. Rep. 19.) The section was intended to declare that no mere irregularity or defect in the form of proceedings which did not tend to the prejudice of the defendant should be ground for a new trial, although a different rule obtains in state courts. (United States v. Molloy, 31 Fed. Rep. 19.) The purpose of the provision is, that where a real question of a difficult point of law arising in the case is such that the two judges sitting on the hearing differ in opinion in regard thereto, they may certify it to the supreme court for an answer. (United States v. Perrin, 131 U. S. 55.)

§ 562. Judgment on demurrer to an indictment.—In every case in any court of the United States, where a demurrer is interposed to an indictment, or to any count or counts thereof, or to any information, and the demurrer is overruled, the judgment shall be respondeat ouster; and thereupon a trial may be ordered at the same term, or a continuance may be ordered, as justice may require. (Rev. Stats., sec. 1026.)

§ 563. Several indictments against the same person, one writ sufficient.—When two or more charges are made, or two or more indictments are found, against any person, only one writ or warrant shall be necessary to commit him for trial; and it shall be sufficient to state in the writ the name or general character of the offenses, or to refer to them only in very general terms. (Rev. Stats., sec. 1027.)

§ 564. Copy of writ to be jailer's authority.—Whenever a prisoner is committed to a sheriff or jailer by virtue of a writ, warrant, or mittimus, a copy thereof shall be delivered to such sheriff or jailer, as his authority to hold the prisoner, and the original writ, warrant, or mittimus shall be returned to the proper court or officer, with the officer's return thereon. (Rev. Stats., sec. 1028.)

§ 565. Writ for removal of a prisoner from one district to another.—Only one writ

or warrant is necessary to remove a prisoner from one district to another. One copy thereof may be delivered to the sheriff or jailer from whose custody the prisoner is taken, and another to the sheriff or jailer to whose custody he is committed, and the original writ, with the marshal's return thereon, shall be returned to the clerk of the district to which he is removed. (Rev. Stats., sec. 1029.)

§ 566. No writ necessary to bring into court a person in custody.—No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody, but the same shall be done on the order of the court or district attorney, for which no fees shall be charged by the clerk or marshal. (Rev. Stats., sec. 1030.)

§ 567. Peremptory challenges.—If, in the trial of a capital offense, the party indicted peremptorily challenges jurors above the number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made. [See sec. 819.] (Rev. Stats., sec. 1031.)

§ 568. Prisoners standing mute, etc.—When any person indicted for any offense against the United States, whether capital or otherwise, upon his arraignment stands mute, or refuses to plead or answer thereto, it shall

be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury. (Rev. Stats., sec. 1032.)

Standing mute.—Where defendant stands mute the court may enter a plea of not guilty and proceed with the trial. (In re Smith, 13 Fed. Rep. 25.) He should have an opportunity to plead, and trial without entry of a plea of not guilty is erroneous. (Palmer v. U. S., 1 Wash. 7.) After he has put in a plea of not guilty it includes everything essential to put him on trial by jury. (U. S. v. Gilbert, 2 Sum. 19.) This section applies to an offense created by a statute enacted since its adoption. (U. S. v. Hare, 2 Wheel. C. C. 283; see generally Ellewood v. Com., 10 Met. 222; Com. v. McKenna, 125 Mass. 397; Com. v. Braley, 1 Mass. 103; Same v. Hill, 14 Mass. 207; Dyott v. Com., 5 Whart. 67; U. S. v. Hare, 2 Wheel. C. C. 283; Com. v. Moore, 9 Mass. 402; U. S. v. Reid, 12 How. 361.)

§ 569. Copy of indictment, etc., delivered to prisoner.—When any person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of the jurors and witnesses shall be

delivered to him at least two entire days before the trial. (Rev. Stats., sec. 1033.)

Treason.—The provision as to three days is expressly confined to treason. (U. S. v. Wood, 3 Wash. C. C. 440.) The prisoner is entitled to a reasonable time after the copy is delivered to him to investigate the character and conduct of the witnesses. (U. S. v. Stewart, 2 Dall. 343.) The list of jurors and witnesses need not specify their occupations (U. S. v. Insurgents, 2 Dall. 335); but the townships in which they respectively reside should be specified (U. S. v. Insurgents, 2 Dall. 335); and copies of both caption and indictment should be delivered to the prisoner.

Other offenses.—In capital offenses other than treason the copy must be delivered two days before the cause is tried by a jury, and not before the party is arraigned (U. S. v. Curtis, 4 Mason, 232; but see U. S. v. Dow, Taney, 34); and the two entire days must be exclusive of the day of its delivery. (U. S. v. Dow, Taney, 34.) If the right to a copy is not insisted on before pleading and trial no objection can afterwards be taken to the proceedings (U. S. v. Cornell, 2 Mason, 91); if he makes no objection till after the jury has been sworn the omission is no ground for arrest of judgment, or for a new trial. (U. S. v. Curtis, 4 Mason, 232.) If he acknowledges before arraignment the receipt of a copy, it is a waiver of his right if he has not received it. (U. S. v. Cornell, 2 Mason, 91.) If the case is not capital the prisoner is not entitled to a copy of the indictment at government expense (U. S. v. Beckford, 4 Blatchf. 337; U. S. v. Hare, 2 Wheel. C. C. 283); nor is he entitled to a list of witnesses or jurors (U. S. v. Williams, 4 Cranch C. C. 1; U. S. v. Wood, 3 Wash. C. C. 440); but in all cases where there has been no preliminary examination the court in its discretion may order a list of witnesses before the grand jury to be furnished (U. S. v. Southmayo, 6 Biss. 321); and a copy of the indictment may be granted on his request. (U. S. v. Williams, 1 Cranch C. C. 178; U. S. v. Curtis, 4 Mason, 232.)

§ 570. Counsel and witnesses for defendant.—Every person who is indicted of treason or other capital crime shall be allowed to make his full defense by counsel learned in the law; and the court before which he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire, and they shall have free access to him at all seasonable hours. He shall be allowed in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial as is usually granted to compel witnesses to appear on behalf of the prosecution. (Rev. Stats., sec. 1034.)

Note.—Accused has the right to compulsory process for witnesses even before indictment. (Burr's Trial, 177.)

§ 571. Verdict of less offense than charged.—In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; *provided*, that such attempt be itself a separate offense. (Rev. Stats., sec. 1035.)

Note.—The indictment charging murder is sufficient upon a verdict of manslaughter. (U. S. v. Leonard, 2 Fed. Rep 689; 18 Blatchf. 187.)

§ 572. Verdict against part of several joint defendants.—On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury. (Rev. Stats., sec. 1036.)

Note.—On an indictment charging conspiracy the acquittal of one is an acquittal of both (U. S. v. Hamilton, 8 Chic. L. N. 211); but if it charges a conspiring of defendants with others unknown, a verdict may be rendered against one, and in favor of the other. (U. S. v. Hamilton, 8 Chic. L. N. 211.)

§ 573. Indictments remitted by circuit and district courts to each other.—Whenever the district attorney deems it necessary, any circuit court may, by order entered on its minutes, remit any indictment pending therein to the next session of the district court of the same district, where the offense charged in the indictment is cognizable by the said district court. And in like manner any district court may remit to the next session of the circuit court of the same district any indictment pending in the said district court. And such remission shall carry with it all recognizances, processes, and proceedings pending in the case in the court from which the remission is made; and the court to which such remission is made shall, after the order of remission is filed therein, act in the case as if the indictment, and all

other proceedings in the same, had been originated in said court. (Rev. Stats., sec. 1037.)

Note.—The object of this section is the transmission of a criminal case with all the proceedings therein from one court to another. (U. S. v. McKee, 4 Dill. 1.) A case remitted from the circuit to the district court may be sent back under proper circumstances. (U. S. v. Murphy, 3 Wall. 649.) The original indictment need not be sent; a certified copy is sufficient. (U. S. v. McKee, 4 Dill. 1.) A circuit court cannot, of its own motion, on an application of defendant, remit an indictment. (U. S. v. Bennett, 16 Blatchf. 338.) After conviction in the district court, the indictment cannot be lawfully remitted to the circuit court under this section. (United States v. Haynes, 26 Fed. Rep. 857. And see *In re Haynes*, 30 Fed. Rep. 766.) In a criminal cause, the circuit court may amend its record after remission to the district court. (Kelly v. United States, 27 Fed. Rep. 616.) The circuit court has jurisdiction of an indictment remitted from the district court, after the defendant had pleaded. (United States v. Richardson, Cir. Ct. Me., 28 Fed. Rep. 61.)

§ 574. Remission from district to circuit court of difficult cases.—Any district court may, by order entered on its minutes, remit any indictment pending therein to the next session of the circuit court, for the same district, when, in the opinion of such district court, difficult and important questions of law are involved in the case; and thereupon the proceedings in such case shall be the same in the circuit court as if such indictment had been originally found and presented therein. (Rev. Stats., sec. 1038.)

Note.—An indictment will not be remitted to the circuit court except in cases of manifest and grave impor-

tance (*U. S. v. Sullivan*, 9 N. Y. Leg. Obs. 193); and when remitted, it may be remitted even after the term when it was presented. (*U. S. v. Morris*, 1 Curt. 23.) The mere fact that exposition to a statute has been given by the district judge is no ground for remitting the indictment. (*U. S. v. O'Sullivan*, 9 N. Y. Leg. Obs. 193.)

§ 575. All capital cases remitted from district to circuit courts.—Every indictment of a capital offense presented to a district court, together with the recognizances taken therein, shall, by order entered on its minutes, be remitted to the next session of the circuit court for the same district; and on the filing of such order and indictment with the clerk of such circuit court, that court shall proceed thereon in the same manner as if said indictment had been originally found and presented therein. (Rev. Stats., sec. 1039.)

§ 576. Capital case carried to the supreme court.—Whenever a judgment of death is rendered in any court of the United States, and the case is carried to the supreme court in pursuance of law, the court rendering such judgment shall, by its order, postpone the execution thereof from time to time and from term to term, until the mandate of the supreme court in the case is received and entered upon the records of such lower court. In case of affirmance by the supreme court, the court rendering the original judgment shall appoint a day for the execution thereof; and in case of reversal, such further proceedings shall be had

in the lower court as the supreme court may direct. (Rev. Stats., sec. 1040.)

§ 577. Judgments for fines, how collected.—In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced; *provided*, that where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid. (Rev. Stats., sec. 1041.)

Note.—If nothing is said in the judgment as to the mode of enforcing it, a *fi. fa.* or a *capias pro* fine may be issued; but if a *fi. fa.* is provided for, a *capias* cannot issue; and if it provides that the party stand committed until the fine is paid a *capias pro* fine may be issued. (Ex parte Teuscher, 23 Int. Rev. Rec. 202.) A person sentenced to pay a fine may be committed till the fine is paid. (U. S. v. Robbins, 15 Int. Rev. Rec. 155.) It is within the discretion of the court to order his imprisonment until the fine is paid. (Ex parte Jackson, 96 U. S. 627.)

§ 578. Poor convicts sentenced and imprisoned for fines. When a poor convict, sentenced by any court of the United States to

pay a fine, or fine and cost, whether with or without imprisonment, has been confined in prison thirty days, solely for the non-payment of such fine, or fine and cost, he may make application in writing to any commissioner of the United States court in the district where he is imprisoned, setting forth his inability to pay such fine, or fine and cost, and after notice to the district attorney of the United States, who may appear, offer evidence, and be heard, the commissioner shall proceed to hear and determine the matter; and if on examination it shall appear to him that such convict is unable to pay such fine, or fine and cost, and that he has not any property exceeding twenty dollars in value, except such as is by law exempt from being taken on execution for debt, the commissioner shall administer to him the following oath: "I do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil precept for debt by the laws of [state where oath is administered]; and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God." And thereupon such convict shall be discharged, the commissioner giving to the jailer or keeper of the jail a certificate setting forth the facts. [See secs. 847, 5296.] (Rev. Stats., sec. 1042.)

Note.—A convict is not entitled to release on a conditional pardon. (In re Ruhl, 5 Sawy. 186.)

§ 579. For offenses against navigation laws—When summary trials may be had.

—Whenever a complaint shall be made against any master, officer, or seaman of any vessel belonging, in whole or in part, to any citizen of the United States, of the commission of any offense, not capital or otherwise infamous, against any law of the United States made for the protection of persons or property engaged in commerce or navigation, it shall be the duty of the district attorney to investigate the same, and the general nature thereof, and if, in his opinion, the case is such as should be summarily tried, he shall report the same to the district judge, and the judge shall forthwith, or as soon as the ordinary business of the court will permit, proceed to try the cause, and for that purpose may, if necessary, hold a special session of the court, either in term time or vacation. (Rev. Stats., sec. 4300.)

§ 580. Complaint and answer.—At the summary trial of offenses against the laws for the protection of persons or property engaged in commerce or navigation, it shall not be necessary that the accused shall have been previously indicted, but a statement of complaint, verified by oath in writing, shall be presented to the court, setting out the offense in such manner as clearly to apprise the accused of the character of the offense complained of, and to enable him to answer the complaint. The complaint or statement shall be read to the ac-

cused, who may plead to or answer the same, or make a counter-statement. The trial shall thereupon be proceeded with in a summary manner, and the case shall be decided by the court, unless, at the time for pleading or answering, the accused shall demand a jury, in which case the trial shall be upon the complaint and plea of not guilty. (Rev. Stats., sec. 4301.)

§ 581. Amendments and adjournments.—It shall be lawful for the court to allow the district attorney to amend his statement of complaint at any stage of the proceedings before verdict, if, in the opinion of the court, such amendment will work no injustice to the accused; and if it appears to the court that the accused is unprepared to meet the charge as amended, and that an adjournment of the cause will promote the ends of justice, such adjournment shall be made until a further day, to be fixed by the court. (Rev. Stats., sec. 4302.)

§ 582. Challenges to jurors.—At the trial in summary cases, if by jury, the United States and the accused shall each be entitled to three peremptory challenges. Challenges for cause, in such cases, shall be tried by the court without the aid of triers. (Rev. Stats., sec. 4303.)

§ 583. Limit of sentences.—It shall not

be lawful for the court to sentence any person convicted in such trial to any greater punishment than imprisonment in jail for one year, or to a fine exceeding five hundred dollars, or both, in its discretion, in those cases where the laws of the United States authorize such imprisonment and fine. (Rev. Stats., sec. 4304.)

§ 584. **Penalties, etc., under navigation laws, how prosecuted, etc.**—All the penalties and forfeitures which may be incurred for offenses against this title may be sued for, prosecuted, and recovered in such court, and be disposed of in such manner, as any penalties and forfeitures which may be incurred for offenses against the laws relating to the collection of duties, except when otherwise expressly prescribed. (Rev. Stats., sec. 4305.)

§ 585. **Fugitives from the justice of a foreign country.**—Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the supreme court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such

treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charges under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. (Rev. Stat., sec. 5270.)

International extradition.—Extradition is a right of foreign governments only, not of individuals. (In re Extradition of Ferrelle, 28 Fed. Rep. 878.) A foreign government has no right by the law of nations to demand of the government of the United States a surrender of a citizen or subject of such foreign government, who has committed a crime in his own country, and is afterwards found within the limits of the United States. It is a right which has no existence, and can only be secured by a treaty stipulation. As between the United States and foreign governments the surrender of fugitives from justice depends upon treaties. (Dos Santos' Case, 2 Brock. 493; United States v. Davis, 2 Sumn. 482; In re Metzger, 5 How. 176; 6 Op. Att'y-Gen. 85; 1 Op. Att'y-Gen. 68, 510; 3 Op. Att'y-Gen. 661; 2 Op. Att'y-Gen. 359; 7 Op. Att'y-Gen. 536; 1 Kent's Com. 39 n.; Wheat. Int. L. 171.) The treaty of 1842 is not only a contract

between the government of Great Britain and the United States, but it is also the law of this land; and a person may, if occasion require, invoke the treaty in any judicial proceeding as a protection against detention or trial. (Ex parte Hibbs, 26 Fed. Rep. 421.) The treaty with France of 1843, providing for the surrender of fugitives from justice, cannot be executed by the president of the United States without an act of Congress. No person can be surrendered under that treaty who is merely charged with crime before a committing magistrate. He must, under our law, be indicted, or under the French law be *mis en accusation* by the *chambre des mises en accusation*. (See *In re Metzger*, 1 Edm. Sel. Cas. 422.) In the absence of a treaty stipulation, it is optional to surrender or not citizens of other countries, to answer for offenses committed at home, though in case of mere political offenses it is seldom done. (In *re Sheazle*, 1 Wood. & M. 68; *Holmes v. Jennison*, 14 Pet. 540, 549; *United States v. Davis*, 2 Sumn. 482, 486; *Mure v. Kaye*, 4 Taunt. 34; *Commonwealth v. Deacon*, 10 Serg. & R. 125; 2 Wheel. Cr. Cas. 15; 1 Am. St. Pap. 115; *New York v. Miln*, 11 Pet. 102; *United States v. Nash*, Bee Adm. 266.) The United States government has never recognized the right, unless under treaty stipulations. (In *re Fetter*, 23 N. J. L. 313; 57 Am. Dec. 384; *Com. v. Deacon*, 10 Serg. & R. 135; *Story's Conf. L.*, secs. 626, 1808; *Jefferson's Letter to Washington*, 7th Nov. 1791; *Jefferson's Letter to Genet*, 1793, 1 Am. St. Pap. 175; *Story's Letter to Gov. Everett*, June 6, 1835, cited in 2 *Life of Story*, 179; 1 *Kent's Com.* 37, note.) Extradition is to be effectuated through the agency of the tribunals of justice, whose province it is to determine the existence of reasonable cause for the charge of crime, and if there be sufficient evidence to justify putting the accused upon his trial. (In *re Metzger*, 1 Edm. Sel. Cas. 402.) Under the treaty with Great Britain of 1842 a preliminary mandate from the executive is not necessary. (In *re Herres*, 33 Fed. Rep. 165.)

Right exists only under treaty stipulations.—Except under the provisions of treaties, the delivery by one country to another of fugitives from justice is a mat-

ter of comity, not of obligation. (*United States v. Rauscher*, 119 U. S. 407.) Extradition from a foreign country, although for a crime committed against the law of a state, must be negotiated through the federal government. (*United States v. Rauscher*, 119 U. S. 407.) Extradition treaties of the United States do not guarantee a fugitive an asylum in any foreign country. So far as they regulate the right of asylum at all, they limit it. (*Ker v. Illinois*, 119 U. S. 436.)

Conduct of proceedings.—The rules prescribed for the conduct of proceedings under extradition treaties are: 1. Demand for surrender and mandate of the president; 2. Previous designation of the commissioner before whom the warrant of arrest is returnable; 3. Certificates to documentary evidence; 4. Record by the commissioner of the proceedings before him; 5. Verified transactions of documents in foreign languages; 6. Contents of complaint. (*Re Henrich*, 5 Blatchf. 414.) Whether a party making complaint is duly authorized to appear in behalf of the foreign government is a matter to be inquired into before the commissioner. (*Re Kelly*, 26 Fed. Rep. 852.) On motion of a sovereignty making the demand, a commissioner may, in his discretion, adjourn the hearing of the extradition proceedings. (*Re Ludwig*, 32 Fed. Rep. 774.)

Requisition for process and surrender.—Requisitions should issue from the supreme political authority of the demanding state, and be addressed to the secretary of state. (8 Op. Att'y-Gen. 240; 4 Op. Att'y-Gen. 201; 7 Ap. Att'y-Gen. 6; 8 Op. Att'y-Gen. 420; *Re Henrich*, 5 Blatchf. 414.) The requisition need not be founded on an indictment or warrant issued on an indictment. (*Re British Prisoners*, 1 Wood. & M. 66; *Re Thomas*, 12 Blatchf. 370.) To authorize arrest and removal from the state or country, it must appear on the application that the crime was committed in the state or country from which the requisition proceeds. (*Ex parte Smith*, 3 McLean, 121; 6 L. R. 57; 8 Op. Att'y-Gen. 215, 306; 1 Op. Att'y-Gen. 83; *Re Vogt*, 14 Op. Att'y-Gen. 251.)

Complaint under oath requisite.—A complaint

made under oath is necessary to authorize a warrant to compel a preliminary examination of a person demanded by a foreign government as a criminal. (*Ex parte McCabe*, 46 Fed. Rep. 363.) It must be a complaint by some one authorized to represent the executive department of the foreign treaty power. (*Re Extradition of Ferrelle*, 24 Blatchf. 155; 28 Fed. Rep. 878.) It is not necessary that the attorney-general, or any member of the executive department of a foreign nation, should himself make the complaint on which the accused is arrested. Any person whom he authorizes or whom he delegates to act for that government is a proper person to appear and file a complaint. (*Re Kelly*, 26 Fed. Rep. 852.) If the complaint be made by a private individual, his authority to act in behalf of the foreign executive should be made to appear before the proceedings before the commissioner are closed, or the proceeding should be dismissed. (*Re Extradition of Ferrelle*, 24 Blatchf. 155; 28 Fed. Rep. 878.) In a complaint for a warrant of extradition, the crime must be clearly set forth and the facts constituting it must be stated; but the averments need not be upon personal knowledge. (*Re Farez*, 7 Blatch. 34, 345, 491; 2 Abb. U. S. 346; 40 How. Pr. 107; *Ex parte Van Hoven*, 4 Dill. 411; 22 Int. Rev. Rec. 217.) If it appear in the proceedings that they are initiated and carried on by a foreign government, it is sufficient, although the complaint does not show the fact. (*Re Herres*, 33 Fed. Rep. 165; reversing 32 Fed. Rep. 583.)

Warrant of arrest.—The fact that the commissioner who issued the warrant is authorized so to do is jurisdictional, and must appear upon the face of the warrant. (*Re Kelly*, 25 Fed. Rep. 270.) Under the treaty with Great Britain, no authority is required from the executive department of the United States to enable a judge, magistrate, or commissioner to issue a warrant for the arrest of an alleged fugitive from justice. (*Ex parte Ross*, 2 Bond. 252.) It is not necessary, preliminary to an investigation here, that a warrant of arrest should have been issued in the foreign jurisdiction. (*Re Thomas*, 12 Blatchf. 370.) Where a warrant of extradition recited that the party was accused of the crime of forgery, without saying what for-

gery, resort might be had to the proceedings before the committing magistrate, and his report, on which the warrant was issued, to ascertain what and how many forgeries the extradition was intended to apply to or include. (*Ex parte Hibbs*, 26 Fed. Rep. 421.) The term "forgery" in the extradition act means that which by universal acceptance it is understood to mean. (*Re Tully*, 22 Blatchf. 220.) The district judge may issue a second warrant, where the first was of questionable regularity. (*Re Fergus*, 30 Fed. Rep. 607.) The warrant may run throughout the United States, and may be executed by any marshal or deputy marshal. (*Re Fergus*, 30 Fed. Rep. 607.) Where a district judge at chambers decided that there was sufficient cause for surrender of a fugitive claimed by the French government under a treaty, the supreme court had no jurisdiction to review that decision. (*Re Metzger*, 5 How. 176.) The governor's warrant for an arrest as a fugitive from justice, on a requisition, can be issued only on an affidavit accompanying the requisition, which positively and directly charges the commission of a specific offense. (*Ex parte Spears*, 88 Cal. 640.) A warrant, when issued by a county judge under section 5270, although he styles himself also an extradition agent, is not invalid because it does not recite the source of his authority to issue it. (*Ex parte McCabe*, 46 Fed Rep. 363.)

§ 586. Subpoena of witnesses—Costs of process and fees of witnesses, how paid.—On the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before

whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States. (Approved August 3, 1882, sec. 3; 22 U. S. Stats. 216, superseding Rev. Stats., sec. 5271.)

§ 587. Witness fees, costs, etc., to be certified to secretary of state.—All witness fees and costs of every nature in cases of extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing takes place to the secretary of state of the United States, who is hereby authorized to allow the payment thereof out of the appropriation to defray the expenses of the judiciary; and the secretary of state shall cause the amount of said fees and costs so allowed to be reimbursed to the government of the United States by the foreign government by whom the proceedings for extradition may have been instituted. (Approved August 3, 1882, sec. 4. 22 U. S. Stats. 216.)

§ 588. Surrender of the fugitive.—It shall be lawful for the secretary of state, under his hand and seal of office, to order the person so committed to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the

crime of which such person shall be so accused, and such person shall be delivered up accordingly; and it shall be lawful for the person so authorized to hold such person in custody, and to take him to the territory of such foreign government, pursuant to such treaty. If the person so accused shall escape out of any custody to which he shall be committed, or to which he shall be delivered, it shall be lawful to retake such person in the same manner as any person accused of any crime against the laws in force in that part of the United States to which he shall so escape, may be retaken on an escape. (Rev. Stats., sec. 5272.)

Surrender under treaty.—Persons may be surrendered under a treaty made after the crime was committed, and after his arrival in this country. (In re Giacomo, 12 Blatchf. 391.) Under the constitution, the subject of intercourse with foreign powers is vested exclusively in the United States government, and states have no authority to grant or cause the extradition of one of its citizens on demand of a foreign power. (People v. Curtis, 50 N. Y. 321; Holmes v. Jennison, 14 Pet. 540; Ex parte Smith, 3 McLean, 121; Cooper v. Galbraith, 3 Wash. C. C. 546.) No state can deliver up a fugitive to a foreign government, as it cannot have treaty relations with such government. (Holmes v. Jennison, 14 Pet. 540.) State courts cannot interfere with the surrender of a fugitive, and the marshal may disregard their process. (6 Op. Att'y-Gen. 227, 237, 270, 290, 466, 713; 7 Op. Att'y-Gen. 482.) A person will not be surrendered to a foreign power where the United States has jurisdiction over the offense charged. (6 Op. Att'y-Gen. 85; 8 Op. Att'y-Gen. 215, 306; In re Vogt, 18 Int. Rev. Rec. 18.) If it appears that there is probable reason to believe defendant guilty, justice requires that he should be put upon his trial. (Re Herres, 33 Fed. Rep. 165.) Where a commissioner, without

special authority, issued a warrant, at the instance of the British consul, for the arrest of a fugitive charged with assault with intent to murder in Ireland, *habeas corpus* did not lie to relieve him from the arrest. (Re Kaine, 14 How. 103.) The law of nations does not require the surrender of a fugitive, whether citizen or alien, to a foreign government, in the absence of a treaty stipulation requiring it. (Ex parte McCabe, *supra*.) A citizen of the United States cannot be surrendered to Mexico as a fugitive, under the treaty with that country, which provides that "neither of the contracting parties shall be bound to deliver up its own citizens." (Id.) But a person may be extradited to Mexico for the crime of forgery of an instrument, which is made an offense by the Mexican laws, he having been held in Mexico for the offense. (Benson v. McMahon, 127 U. S. 457.) Under the treaties of 1852 between the United States and Prussia, and other states of the Germanic Confederation, an application should be granted where the evidence is such as to fairly prove the charge. (Re Risch, 36 Fed. Rep. 546.) A person brought to this country by extradition proceedings cannot be convicted of any other offense than that charged, although upon the same evidence which was produced before the committing magistrate in England, in the extradition proceedings. (United States v. Rauscher, 119 U. S. 407.)

Immunity from arrest in civil action.—One who has been extradited, under a treaty with a foreign country, upon a charge of which he is acquitted, is not, before the expiration of a reasonable time for his return to the country from which he was extradited, subject to arrest in a civil action in a state court for any cause arising prior to his extradition. (Re Reinitz, 39 Fed. Rep. 204; United States v. Rauscher, *supra*.)

§ 589. Time allowed for extradition.—Whenever any person who is committed under this title or any treaty, to remain until delivered up in pursuance of a requisition, is not so delivered up and conveyed out of the United

States within two calendar months after such commitment, over and above the time actually required to convey the prisoner from the jail to which he was committed, by the readiest way, out of the United States, it shall be lawful for any judge of the United States, or of any state, upon application made to him by or on behalf of the person so committed, and upon proof made to him that reasonable notice of the intention to make such application has been given to the secretary of state, to order the person so committed to be discharged out of custody, unless sufficient cause is shown to such judge why such discharge ought not to be ordered. (Rev. Stats., sec. 5273.)

§ 590. Continuance of provisions limited.—The provisions of this title relating to the surrender of persons who have committed crimes in foreign countries shall continue in force during the existence of any treaty of extradition with any foreign government, and no longer. (Rev. Stats., sec. 5274.)

§ 591. Protection of the accused.—Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime for which he is duly accused, the president shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against law-

less violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused. (Rev. Stats., sec. 5275.)

§ 592. Powers of agent receiving offenders delivered by a foreign government.

—Any person duly appointed as agent to receive, in behalf of the United States, the delivery, by a foreign government, of any person accused of crime committed within the jurisdiction of the United States, and to convey him to the place of his trial, shall have all the powers of a marshal of the United States, in the several districts through which it may be necessary for him to pass with such prisoner, so far as such power is requisite for the prisoner's safe-keeping. (Rev. Stats., sec. 5276.)

§ 593. Penalty for opposing agents, etc.

—Every person who knowingly and willfully obstructs, resists, or opposes such agent in the execution of his duties, or who rescues or attempts to rescue such prisoner, whether in the custody of the agent or of any officer or person to whom his custody has lawfully been committed, shall be punishable by a fine of not

more than one thousand dollars, and by imprisonment for not more than one year. (Rev. Stats., sec. 5277.)

§ 594. Evidence on the hearing—Proof of authenticity.—In all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under title sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing, for all the purposes of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant, or other paper, or copies thereof, so offered, are authenticated in the manner required by this act. (22 U. S. Stats. 216, sec. 5.)

Hearing on application for extradition.—Where there is an application for extradition sustained by complaint on oath, it is not for the judge to consider whether or not a foreign government has authorized the application; he has only to examine the evidence of criminality, and if not sufficient to sustain the charge, to certify the same to the secretary of state. (Re Dugan, 2 Low. 367.) The first question is one of law, open upon the face of the papers to judicial inquiry; the second is one of fact,

upon which the governor's decision is sufficient to justify removal until the presumption in its favor is overthrown. (*Roberts v. Reilly*, 116 U. S. 80.) In a proceeding under the treaty with Great Britain, evidence of criminality must be such as would justify the arrest and commitment of the accused according to law in the place where he is found. (*Re McPhun*, 24 Blatchf. 254; 30 Fed. Rep. 57; *Ex parte Kaine*, 3 Blatchf. 1; *U. S. v. Warr*, 3 N. Y. Leg. Obs. 346; *Re Heilbronn*, 12 N. Y. Leg. Obs. 65; 4 Op. Att'y-Gen. 201, 330; *Re Kelly*, 2 Low. 339; *Re Macdonnell*, 18 Int. Rev. Rec. 11; *Re Farez*, 2 Abb. U. S. 346.) Where a requisition was had on a charge of embezzling money, an indictment for embezzling money and property simply charges the same offense in different ways to meet the evidence as it may appear on the trial, and is unobjectionable. (*Waterman v. State*, 116 Ind. 51.)

Evidence admissible.—Copies of depositions taken by a magistrate in a foreign country must be certified by the United States consul there to be authenticated, so as to entitle them to be received for similar purposes by the tribunals of the foreign country. (*Re McPhun*, 24 Blatchf. 254; 30 Fed. Rep. 57.) Upon hearing a case arising under treaty, not only copies of depositions, but also copies of warrants and other papers, certified under the hand of the person issuing the same, and attested on oath of the party producing them to be true copies, are admissible as evidence of criminality of the accused. (*Ex parte Ross*, 2 Bond, 252.) The act of Congress of 1860 relating to proof of authenticity of papers produced in the proceedings does not repeal prior acts, but merely provides another mode of authentication. (*Ibid.*) The judicial proceeding in a Prussian court being valid evidence in that country, a certificate of the United States minister that the documents are legally authenticated entitles them to be received here as evidence where the certificates are in sufficient form. (*Re Behrendt*, 23 Blatchf. 40; *Re Farez*, 7 Blatchf. 345; *Re Wadge*, 15 Fed. Rep. 864; 21 Blatchf. 300.) Under the act of 1882 regarding evidence in extradition cases, the certificate of the resident minister to copies of documentary evidence from abroad may be supplemented by oral proof of competency of the originals. (*Re Wadge*, 21

Blatchf. 300; *Re Heinrich*, 5 Blatchf. 414.) Under the Revised Statutes, depositions may be authenticated by a vice-consul of the United States. (*Re Herres*, 33 Fed. Rep. 165.) In an extradition proceeding under the treaty with Great Britain of Aug. 9, 1842, the evidence of the fugitive's criminality must be such as would justify his apprehension and commitment according to the law of the place where he is found. (*Re McPhun*, 24 Blatchf. 254.) Copies of depositions taken by a magistrate in such country must be certified by the United States consul there to be authenticated. (*Id.*)

Rights of party accused.—The party proceeded against has the right to examine witnesses in his own behalf. (*Re Kelley*, 25 Fed. Rep. 268.) The testimony of the accused is not admissible, although the judge be sitting in a state where such evidence is admissible. (*Re Dugan*, 2 Low. 367.) The evidence may be in the form authorized in the country whence it comes, and in substance sufficient to warrant action in the country whose action is invoked. (*Re Dugan*, 2 Low. 367.) It may be open to the petitioner, when before the Canadian courts, to show that the extradition proceedings were not prosecuted in good faith. But, having been surrendered, it is not for him to raise that question before the tribunals of his own country. (*Adriance v. Lagrave*, 59 N. Y. 110; *Dow's Case*, 18 Pa. 37; *Re Miller*, 23 Fed. Rep. 34.) Under the Canada Extradition Statute, s. s. 3, sec. 9, the accused can only show that the offense is either a political one, or that it is not an extradition crime. The investigation cannot take the features of a trial. (*Re Debaun*, Can. Sup. Ct., 11 Cr. L. Mag. 47.) In order to justify the extradition from England of the subject of a foreign state, there must be evidence of an act committed by him in the foreign country, amounting to an offense against the law of such country, and which, if committed in England, would amount to an offense against English law. (*Re Bellencontre* (1891), 2 Q. B. 122.)

Nature of the proceedings.—Extradition proceedings do not involve in their nature the right of accused not to be prosecuted upon any other charge than that

upon which his extradition is asked. (*United States v. Lawrence*, 13 Blatchf. 295; 6 Op. Att'y-Gen. 691; *United States v. Caldwell*, 8 Blatchf. 131; *Adrian v. Lagrave*, 59 N. Y. 110; *Re Miller*, 23 Fed. Rep. 33.) But one extradited from a foreign country may claim exemption from trial upon any charge other than that mentioned in the extradition proceedings; and this right cannot be waived. (*Ex parte Cov*, 32 Fed. Rep. 911.) The extradition proceedings are in some respects like preliminary examinations; and if it appear that a crime has been committed, and that there is probable reason to believe that defendant is guilty of that crime, substantial justice requires that he shall be put upon trial. (*Re Herres*, 33 Fed. Rep. 165.) Extradition is not defeated by the fact that a part of the alleged offenses named in the warrant are not extraditable if the others are. (*Re Bellencontre*, (1891), 2 Q. B. 122.)

§ 595. Fugitives from justice of a state or territory.—Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such

authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory. (Rev. Stats., sec. 5278.)

Note.—(See *Robb v. Connolly*, 111 U. S. 624.) The term "magistrate," used in this section, includes an assistant police magistrate of a city. (*Kurtz v. State*, 22 Fla. 36.) A person who has committed a crime in one state, and has left it, so as to be beyond the reach of process, is a fugitive from justice, regardless of his purpose in leaving. (*Burner v. Richter*, 37 Minn. 436.) Extradition from one state to another can be had only when the person charged is a fugitive from the state in which the crime was committed. (*State v. Jackson* (Tenn.), 1 L. R. A. 70.)

§ 596. Penalty for resisting agent, etc.

—Any agent so appointed who receives the fugitive into his custody shall be empowered to transport him to the state or territory from which he has fled. And every person who, by force, sets at liberty or rescues the fugitive from such agent while so transporting him, shall be fined not more than five hundred dollars, or imprisoned not more than one year. (Rev. Stats., sec. 5279.)

Review on habeas corpus. — The federal and state courts have concurrent jurisdiction in extradition proceedings. (*Ex parte Brown*, 28 Fed. Rep. 653; *Re Roberts*,

24 Fed. Rep. 132.) And the question of lawful arrest of a person as a fugitive from justice from a state may be inquired into by either a federal or a state court. (Roberts v. Reilly, 116 U. S. 80; *Re Doo Woon*, 18 Fed. Rep. 898.) A writ of *habeas corpus* in a case of extradition cannot perform the office of a writ of error. (Willis v. Bayles, 105 Ind. 363; *State v. Neel*, 48 Ark. 283; *Ex parte Boenenghausen*, 21 Mo. App. 267; *Oteiza y Cortes v. Jacobus*, 136 U. S. 330; *Powell v. Dayton etc. R. Co.*, 16 Or. 33; 8 Am. St. Rep. 251; *Re Savin*, 131 U. S. 267.) The court cannot investigate the question as to the guilt or innocence of the defendant (*Re Roberts*, 24 Fed. Rep. 132); or the grade of the guilt (*Re Palmer*, 18 Int. Rev. Rec. 84.) Although courts may review the decisions of executive authority in such proceedings, they will not overrule the decisions unless they are clearly satisfied that an error has been committed. (*Ex parte Brown*, 28 Fed. Rep. 653.) The court will not reverse the decision of the commissioner on the question of criminality of the accused. (*Re Stupp*, 12 Blatchf. 501; *Re Macdonnell*, 11 Blatchf. 170; *Re Vandervelpen*, 14 Blatchf. 137; *Re Wahl*, 15 Blatchf. 334; *Re Wiegand*, 14 Blatchf. 370.)

§ 597. Arrest of deserting seamen from foreign vessels.—On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power, to issue

warrants to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested, not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such deserter shall be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect. (Rev. Stats., sec. 5280.)

§ 598. Power of foreign consuls over disputes between seamen.—Whenever it is stipulated by treaty or convention between the United States and any foreign nation that the consul-general, consuls, vice-consuls, or consular or commercial agents of each nation, shall have exclusive jurisdiction of controversies, difficulties, or disorders arising at sea or in the waters or ports of the other nation, between the master or officers and any of the crew, or between any of the crew themselves, of any vessel belonging

to the nation represented by such consular officer, such stipulations shall be executed and enforced within the jurisdiction of the United States as hereinafter declared. But before this section shall take effect as to the vessels of any particular nation having such treaty with the United States, the president shall be satisfied that similar provisions have been made for the execution of such treaty by the other contracting party, and shall issue his proclamation to that effect, declaring this section to be in force as to such nation. (Rev. Stats., sec. 4079.)

§ 599. Arrest of seamen on application of consul.—In all cases within the purview of the preceding section, the consul-general, consul, or other consular or commercial authority of such foreign nation charged with the appropriate duty in the particular case, may make application to any court of record of the United States, or to any judge thereof, or to any commissioner of a circuit court, setting forth that such controversy, difficulty, or disorder has arisen, briefly stating the nature thereof, and when and where the same occurred, and exhibiting a certified copy or extract of the shipping articles, roll, or other proper paper of the vessel, to the effect that the person in question is of the crew or ship's company of such vessel; and further stating and certifying that such person has withdrawn himself, or is believed to be about to withdraw himself, from the control and discipline of the master and officers of the

vessel, or that he has refused, or is about to refuse, to submit to and obey the lawful jurisdiction of such consular or commercial authority in the premises; and further stating and certifying that, to the best of the knowledge and belief of the officer certifying, such person is not a citizen of the United States. Such application shall be in writing and duly authenticated by the consular or other sufficient official seal. Thereupon such court, judge, or commissioner shall issue his warrant for the arrest of the person so complained of, directed to the marshal of the United States for the appropriate district, or in his discretion to any person, being a citizen of the United States, whom he may specially depute for the purpose, requiring such person to be brought before him for examination at a certain time and place. (Rev. Stats., sec. 4080.)

§ 600. Commitment and discharge.— If, on such examination, it is made to appear that the person so arrested is a citizen of the United States, he shall be forthwith discharged from arrest, and shall be left to the ordinary course of law. But if this is not made to appear, and such court, judge, or commissioner finds, upon the papers hereinbefore referred to, a sufficient *prima facie* case that the matter concerns only the internal order and discipline of such foreign vessel, or, whether in its nature civil or criminal, does not affect directly the execution of the laws of the United States, or

the rights and duties of any citizen of the United States, he shall forthwith, by his warrant, commit such person to prison, where prisoners under sentence of a court of the United States may be lawfully committed, or, in his discretion, to the master or chief officer of such foreign vessel, to be subject to the lawful orders, control, and discipline of such master or chief officer, and to the jurisdiction of the consular or commercial authority of the nation to which such vessel belongs, to the exclusion of any authority or jurisdiction in the premises of the United States or any state thereof. No person shall be detained more than two months after his arrest, but at the end of that time shall be set at liberty and shall not again be arrested for the same cause. The expenses of the arrest and the detention of the person so arrested shall be paid by the consular officers making the application. (Rev. Stats., sec. 4081.)

§ 601. Custody of United States prisoners—Expenses to be paid by U. S.—All the expenses attendant upon the transportation from place, and upon the temporary or permanent confinement of persons arrested or committed under the laws of the United States, as well as upon the execution of any sentence of a court thereof respecting them, shall be paid out of the treasury of the United States in the manner provided by law. (Rev. Stats., sec. 5536.)

§ 602. Places of confinement.—In a state where the use of jails, penitentiaries, or other houses is not allowed for the imprisonment of persons arrested or committed under the authority of the United States, any marshal in such state, under the direction of the judge of the district, may hire, or otherwise procure, within the limits of such state, a convenient place to serve as a temporary jail. (Rev. Stats., sec. 5537.)

§ 603. Marshals to make provision for safe-keeping of prisoners.—The marshal shall make such other provision as he may deem expedient and necessary for the safe-keeping of the prisoners arrested or committed under the authority of the United States, until permanent provision for that purpose is made by law. (Rev. Stats., sec. 5538.)

§ 604. United States convicts in state penitentiaries.—Whenever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any state or territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the state or territory in which such jail or penitentiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same, under the laws of such state or territory. (Rev. Stats., sec. 5539.)

§ 605. Selection of penitentiary in a divided district.—Where a judicial district has been or may hereafter be divided, the circuit and district courts of the United States shall have power to sentence any one convicted of an offense punishable by imprisonment at hard labor to the penitentiary within the state, though it be out of the judicial district in which the conviction is had. (Rev. Stats., sec. 5540.)

§ 606. Sentences for longer term than a year, where to be executed.—In every case where any person convicted of an offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose. (Rev. Stats., sec. 5541.)

§ 607. Penitentiary sentences, where to be executed.—In every case where any criminal convicted of any offense against the United States is sentenced to imprisonment and confinement to hard labor, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature

of the state for that purpose. (Rev. Stats., sec. 5542.)

§ 608. Deduction from term of imprisonment for good conduct.—All persons who have been or may be convicted of any offense against the laws of the United States, and confined in any state jail or penitentiary in execution of the judgment upon such conviction, who so conduct themselves that no charge for misconduct is sustained against them, shall have a deduction of one month in each year made from the term of their sentence, and shall be entitled to their discharge so much the sooner, upon the certificate of the warden or keeper of such jail or penitentiary, with the approval of the attorney-general. (Rev. Stats., sec. 5543.)

§ 609. To what prisoners to apply.—The preceding section, however, shall apply to such prisoners only as are confined in jails or penitentiaries where no credits for good behavior are allowed; but in other cases, all prisoners now or hereafter confined in the jails or penitentiaries of any state, for offenses against the United States, shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary. (Rev. Stats., sec. 5544.)

§ 610. Credits for good conduct and on discharge, etc.—That all prisoners who have been, or shall hereafter be, convicted of any

offense against the laws of the United States, and confined, in execution of the judgment or sentence upon such conviction, in any prison or penitentiary of any state or territory which has no system of commutation for its own prisoners, shall have a deduction from their several terms of sentence of five days in each and every calendar month during which no charge of misconduct shall have been sustained against each severally, who shall be discharged at the expiration of his term of sentence less the time so deducted, and a certificate of the warden or keeper of such prison [or] penitentiary of such deduction shall be entered on the warrant of commitment; *provided*, that if during the term of imprisonment the prisoner shall commit any offense for which he shall be convicted by a jury, all remissions theretofore made shall be thereby annulled. (18 Stat. L. 479; 1 Sup. Rev. Stats., 184, sec. 1.)

§ 611. To be provided with clothes and money on discharge.—That on the discharge from any prison of any person convicted under the laws of the United States on indictment, he or she shall be provided by the warden or keeper of said prison with one plain suit of clothes and five dollars in money, for which charge shall be made and allowed in the accounts of said prison with the United States; *provided*, that this section shall not apply to persons sentenced to a term of imprisonment of less than

six months. (Act of March 3, 1875, 18 Stat. L. 479; 1 Sup. Rev. Stat. 184, sec. 2.)

§ 612. Actual reasonable cost of subsisting prisoners to be paid.—Hereafter there shall be allowed and paid by the attorney-general, for the subsistence of prisoners in the custody of any marshal of the United States and the warden of the jail in the District of Columbia, such sum only as it reasonably and actually cost to subsist them. And it shall be the duty of the attorney-general to prescribe such regulations for the government of the marshals and the warden of the jail in the District of Columbia, in relation to their duties under this chapter, as will enable him to determine the actual and reasonable expenses incurred. (Rev. Stats., sec. 5545.)

§ 613. Designation of penitentiary by attorney-general.—All persons who have been, or who may hereafter be, convicted of crime by any court of the United States whose punishment is imprisonment in a district or territory where, at the time of conviction, or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, shall be confined for the term for which they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient state or territory, to be designated by the attorney-

general, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the district or territory where the conviction has occurred; and if the conviction be had in the District of Columbia the transportation and the delivery shall be by the warden of the jail of that District; the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and the marshal, or the warden of the jail in the District of Columbia, only, to be paid by the attorney-general, out of the judiciary fund. But if, in the opinion of the attorney-general, the expense of transportation from any state, territory, or the District of Columbia, in which there is no penitentiary, will exceed the cost of maintaining them in jail in the state, territory, or the District of Columbia, during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences. And the place of imprisonment may be changed in any case, when, in the opinion of the attorney-general, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel or improper treatment; *provided, however*, that no change shall be made in the case of any prisoner on the ground of the unhealthiness of the prisoner, or because of his treatment, after his conviction and during his term of imprisonment, unless such

change shall be applied for by such prisoner, or some one in his behalf. (Rev. Stats., sec. 5546, as amended by Act of July 12, 1876, 19 Stat. L. 88.)

§ 614. Attorney-general to contract for subsistence, etc.—The attorney-general shall contract with the managers or proper authorities having control of such prisoners, for the imprisonment, subsistence, and proper employment of them, and shall give the court having jurisdiction of such offenses notice of the jail or penitentiary where such prisoners will be confined. (Rev. Stats., sec. 5547.)

§ 615: Court may order sentence executed in house of correction.—Whenever any person is convicted of any offense against the United States which is punishable by fine and imprisonment, or by either, the court by which the sentence is passed may order the sentence to be executed in any house of correction or house of reformation for juvenile delinquents within the state or district where such court is held, the use of which is authorized by the legislature of the state for such purpose. (Rev. Stats., sec. 5548.)

§ 616. Confinement of juvenile offenders.—Juvenile offenders against the laws of the United States, being under the age of sixteen years, and who may hereafter be convicted of crime, the punishment whereof is im-

prisonment, shall be confined during the term of sentence in some house of refuge to be designated by the attorney-general, and shall be transported and delivered to the warden or keeper of such house of refuge by the marshal of the district where such conviction has occurred; or if such conviction be had in the District of Columbia, then the transportation and delivery shall be by the warden of the jail of that district, and the reasonable actual expense of the transportation, necessary subsistence, and hire, and transportation of assistants and the marshal or warden, only, shall be paid by the attorney-general out of the judiciary fund. (Rev. Stats., sec. 5549.)

§ 617. Attorney-general to contract for their subsistence.—The attorney-general shall contract with the managers or persons having control of such houses of refuge for the imprisonment, subsistence, and proper employment of all such juvenile offenders, and shall give the several courts of the United States and of the District of Columbia notice of the places so provided for the confinement of such offenders; and they shall be sentenced to confinement in the house of refuge nearest the place of conviction so designated by the attorney-general. (Rev. Stats., sec. 5550.)

§ 618. Removal of prisoners in case of contagion or epidemic.—The judge of any district court, within whose district any con-

tagious or epidemic disease shall at any time prevail, so as, in his opinion, to endanger the lives of persons confined in the prison of such district, in pursuance of any law of the United States, may direct the marshal to cause the persons so confined to be removed to the next adjacent prison where such disease does not prevail, there to be confined until they may safely be removed back to the place of their first confinement. Such removals shall be at the expense of the United States. (Rev. Stats., sec. 4800.)

§ 620. Capital offenses.—No person shall be prosecuted, tried, or punished for treason or other capital offense, willful murder excepted, unless the indictment is found within three years next after such treason or capital offense is done or committed. (Rev. Stats., sec. 1043.)

See U. S. v. Brown, 2 Cow. 267.

§ 621. Offenses not capital.—No person shall be prosecuted, tried, or punished for any offense not capital, except as provided in section one thousand and forty-six, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed. But this court shall not have effect to authorize the prosecution, trial, or punishment for any offense barred by the provisions of existing laws. (19 U. S. Stats., 32; 1 Sup. Rev. Stats. 204; Rev. Stats., sec. 1044.)

Offenses not capital.—This section applies to prosecutions under statutes passed since its adoption, and is general in its nature. (*Adams v. Woods*, 2 Cranch, 336; *U. S. v. Mayo*, 1 Gall. 397; *U. S. v. Brown*, 2 Low. 267; *Johnson v. U. S.*, 3 McLean, 89; *U. S. v. Ballard*, 3 McLean, 469; *U. S. v. Shorey*, 9 Int. Rev. Rec. 202; *U. S. v. Dustin*, 15 Int. Rev. Rec. 30.) It applies to offenses at common law committed in the District of Columbia. (*U. S. v. Slocum*, 1 Cranch C. C. 485; *U. S. v. Porter*, 2 Cranch C. C. 60; *U. S. v. Watkins*, 3 Cranch C. C. 441.) It runs from the time of the commission of the offense to the finding of the indictment or filing of the information (*U. S. v. Ballard*, 3 McLean, 169); and that although a prior indictment was found within the three years, but upon which a *not. pros.* was entered. (*U. S. v. Ballard*, 3 McLean, 169.) The indictment may set forth the true time of the commission of the offense, and any facts which show defendant cannot avail himself of the limitation (*U. S. v. Watkins*, 3 Cranch C. C. 441; *U. S. v. White*, 5 Cranch C. C. 368); and evidence may be given even under the general issue that he fled from justice to avoid the bar of the statute. (*U. S. v. White*, 5 Cranch C. C. 368.) The indictment will not be quashed although it appears upon the record that the offense was committed more than three years before its finding (*U. S. v. White*, 5 Cranch C. C. 368; *U. S. v. Cook*, 17 Wall. 168); nor will judgment be arrested for that reason. (*U. S. v. Cook*, 17 Wall. 168.) The defense cannot be set up by demurrer. (*U. S. v. Cook*, 17 Wall. 168; but see *contra*, *U. S. v. Watkins*, 3 Cranch C. C. 441; *U. S. v. White*, 5 Cranch C. C. 368.) A party is entitled to the benefit of the limitation although the government does not know him to be the person who committed the crime (*U. S. v. White*, 5 Cranch C. C. 368), and although he committed the crime on the high seas and did not return until the three years had expired. (*U. S. v. Brown*, 2 Low. 267.) It is not necessary to plead the statute specially; it may be taken advantage of under the plea of not guilty. (*U. S. v. Cook*, 17 Wall. 168; *U. S. v. Fermenting Tubs*, 1 Abb. U. S. 268; *U. S. v. White*, 5 Cranch C. C. 368; *U. S. v. Brown*, 2 Low. 267; *Parsons v. Hunter*, 2 Sum. 419.) If a public officer embezzles public funds the offense is within the provisions of this section

(U. S. v. Cook, 17 Wall. 168); but an offense arising under the revenue laws is not within its provisions (U. S. v. Hirsch, 100 U. S. 33); but a plea of the lapse of three years is good to an indictment for a conspiracy, although the overt act necessary to the offense may be one affecting the revenue. (U. S. v. Hirsch, 100 U. S. 33; U. S. v. Blunt, 7 Chic. L. N. 258; but see U. S. v. Fehrenback, 2 Woods, 175; U. S. v. Dustin, 15 Int. Rev. Rec. 30.) Fraudulently procuring one's name to be entered on the pension roll is a commission of the offense every time he claims his pension. (U. S. v. Coggin, 3 Fed. Rep. 492; 9 Biss. 416.) If a pensioner makes demand on an agent for his pension more than two years before the prosecution this section is a bar. (U. S. v. Irvine, 98 U. S. 450.)

§ 622. Fleeing from justice.— Nothing in the two preceding sections shall extend to any person fleeing from justice. (Rev. Stats., sec. 1045.)

Fleeing from justice.—Fleeing from justice means leaving one's home or abode to avoid detection for some offense against the United States. (U. S. v. O'Brian, 3 Dill. 381.) After flight, an open and public return more than three years before indictment bars the prosecution (U. S. v. White, 5 Cranch C. C. 38), either by leaving the jurisdiction or concealing one's self within it. (U. S. v. White, 5 Cranch C. C. 38.) If one flees to avoid punishment the statute is no bar, though he did not flee to avoid process. (U. S. v. White, 5 Cranch C. C. 38; U. S. v. White, 5 Cranch C. C. 116.) Continuing on a cruise after commission of the crime is not a fleeing from justice. (U. S. v. Brown, 2 Low. 267.)

§ 623. Crimes under the revenue laws.—No person shall be prosecuted, tried, or punished for any crime arising under the revenue laws, or the slave-trade laws of the United States, unless the indictment is found or the

information is instituted within five years next after the committing of such crime. (Rev. Stats., sec. 1046.)

Offenses against revenue laws.—This section does not embrace every law of fines or forfeiture. (U. S. v. Mayo, 1 Gall. 377.) The term “revenue laws” does not mean laws which, by indirect operation, may conduce to the public wealth. (U. S. v. Norton, 91 U. S. 566; U. S. v. Mayo, 1 Gall. 377.) But it applies to special acts violating laws made to protect the revenue. (U. S. v. Hirsch, 100 U. S. 33.) As making a false entry of goods by a fraudulent invoice and false classification. (U. S. v. Hirsch, 100 U. S. 33.) Or to a crime created by a statute relating to the internal revenue. (U. S. v. Wright, 11 Int. Rev. Rec. 35; U. S. v. Dustin, 15 Int. Rev. Rec. 30.) Nor is the act to establish a money-order system. (U. S. v. Norton, 91 U. S. 566.) Offenses against the customs are crimes punishable by fine and imprisonment, forfeitures carried into effect by seizure, condemnation, and sale, and pecuniary penalties recoverable by action. (In re Landsberg, 11 Int. Rev. Rec. 150.) But not if a statute provides for fine or imprisonment, or both, at the discretion of the court. (In re Landsberg, 11 Int. Rev. Rec. 150; U. S. v. Shorey, 9 Int. Rev. Rec. 202; McGlinchy v. U. S., 4 Cliff. 312; Perkins v. U. S., 4 Cliff. 321; United States v. One Oil Painting, 31 Fed. Rep. 881.)

§ 624. Penalties and forfeitures under laws of United States.—No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued; *provided*, that the person of the offender, or the property liable for such penalty or forfeiture,

shall, within the same period, be found within the United States; so that the proper process therefor may be instituted and served against such person or property. (Rev. Stats., sec. 1047.)

Note.—It applies equally to an action of debt to recover a penalty. (Adams v. Woods, 2 Cranch, 336; Stimpson v. Pond, 2 Curt. 502.) It applies to civil actions and not to prosecutions for the crime. (U. S. v. Brown, 2 Low. 267.) It does not apply to actions on a bond, or for the penalty named in the bond. (Raymond v. U. S., 14 Blatchf. 51.) A state statute cannot bar an action arising under an act of Congress. (McGlenchy v. U. S., 4 Cliff. 312; Perkins v. U. S., 4 Cliff. 321.) “Penalty” is a fixed pecuniary mulct incurred for violation of a law. (In re Landsberg, 11 Int. Rev. Rec. 150.) And the limitation applies to suits to recover such penalty, as well as fines and forfeitures accruing under the laws of the United States and those accruing to the United States unless specifically excepted. (U. S. v. Maillard, 4 Ben. 459; In re Landsberg, 11 Int. Rev. Rec. 150), whether the action be *in rem* or *in personam* (The Boston, 3 Fed. Rep. 807); as for refusal of a master to deposit papers with the consul (Parsons v. Hunter, 2 Sum. 419), and a fraudulent concealment of the cause of action will not prevent the running of the statute. (U. S. v. Maillard, 4 Ben. 459.) Five years from the time “when the penalty or forfeiture accrued” is the limitation for actions of debt for penalties. (Hatch v. The Boston, 3 Fed. Rep. 810.) A statute imposing a penalty for the master’s refusal or neglect to deposit papers with the consul is not a revenue law. (Parsons v. Hunter, 2 Sum. 419.) Under this clause a right to forfeit the charter of a national bank for violation of the provisions of U. S. Rev. Stat., tit. 62, is limited to five years. (Welles v. Graves, 7 R. R. & Corp. L. J. 392; 41 Fed. Rep. 459.)

§ 625. Under customs revenue law.—
That no suit or action to recover any pecuniary

penalty or forfeiture of property accruing under the customs revenue laws of the United States shall be instituted unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued; *provided*, that the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation. (Rev. Stats., sec. 1047.)

§ 626. Parties beyond reach of process during the rebellion.—In all cases where, during the late rebellion, any person could not, by reason of resistance to the execution of the laws of the United States, or of the interruption of the ordinary course of judicial proceedings, be served with process for the commencement of any action, civil or criminal, which had accrued against him, the time during which such person was beyond the reach of legal process shall not be taken as any part of the time limited by law for the commencement of such action. (Rev. Stats., sec. 1048.)

See *Cutler v. Kouns*, 110 U. S. 720.

Suspension of operation of statute.—A state law may suspend the operation of the statute for a longer period. (*Graydon v. Sweet*, 1 Woods, 418.) This statute is not a statute of limitations, not specifying the time in which action may be brought. (*Graydon v. Sweet*, 1 Woods, 418.) If defendant was where process could be served on him, the limitation in other cases applies. (*Britton v. Butler*, 11 Blatchf. 350.) The suspension of

the statute ceased a reasonable time after restoration of peace. (U. S. v. Muhlenbrink, 1 Woods, 569.) All the time must be deducted during which suits could not be prosecuted, by resistance to laws or interruption to judicial proceedings, whether before or after its passage. (U. S. v. Wiley, 11 Wall. 508.) It does not apply between persons who resided in the confederate states. (Lockhart v. Horn, 1 Woods, 569.)

CHAPTER XXIII.

COURTS OF CLAIMS—ORGANIZATION AND SESSIONS.

- § 627. Judges.
- § 628. Seal.
- § 629. Court-rooms, etc., how provided.
- § 630. Sessions—Quorum.
- § 631. Officers of the court.
- § 632. Salaries of clerks, bailiff, and messenger.
- § 633. Clerk's bond.
- § 634. Contingent fund.
- § 635. Reports to Congress, copies for departments, etc.
- § 636. Members of Congress not to practice in the court.

§ 627. **Judges.**—The court of claims, established by the act of February twenty-four, eighteen hundred and fifty-five, shall be continued. It shall consist of a chief justice and four judges, who shall be appointed by the President, by and with the advice and consent of the Senate, and hold their offices during good behavior. Each of them shall take an oath to support the constitution of the United States, and to discharge faithfully the duties of his office, and shall be entitled to receive an annual salary of four thousand five hundred dollars, payable quarterly from the treasury. (Rev. Stats., sec. 1049.)

§ 628. **Seal.**—The court of claims shall have a seal, with such device as it may order. (Rev. Stats., sec. 1050.)

§ 629. Court-rooms, etc., how provided.

—It shall be the duty of the speaker of the House of Representatives to appropriate such rooms in the Capitol, at Washington, for the use of the court of claims, as may be necessary for their accommodation, unless it appears to him that such rooms cannot be so appropriated without interfering with the business of Congress. In that case the court shall procure, at the city of Washington, such rooms as may be necessary for the transaction of their business. (Rev. Stats., sec. 1051.)

§ 630. Sessions—Quorum.—The court of claims shall hold one annual session, at the city of Washington, beginning on the first Monday in December, and continuing as long as may be necessary for the prompt disposition of the business of the court. And any three judges of the court of claims shall constitute a quorum; *provided*, that the concurrence of three judges shall be necessary to the decision of any case. (Rev. Stats., sec. 1052; 18 U. S. Stats., 252.)

Note.—The jurisdiction extends throughout the United States. (Jones v. U. S., 1 Ct. of Cl. 383.) The rules of evidence as found in the common law governs its action (Moore v. U. S., 91 U. S. 270); and it takes judicial notice of the laws of the several states. (Sykes v. U. S., 8 Ct. of Cl. 330.)

§ 631. Officers of the court.—The said court shall appoint a chief clerk, an assistant clerk, if deemed necessary, a bailiff, and a mes-

senger. The clerks shall take an oath for the faithful discharge of their duties, and shall be under the direction of the court in the performance thereof; and for misconduct or incapacity they may be removed by it from office; but the court shall report such removals, with the cause thereof, to Congress, if in session, or if not, at the next session. The bailiff shall hold his office for a term of four years, unless sooner removed by the court for cause. (Rev. Stats., sec. 1053.)

§ 632. **Salaries of clerks, etc.**—The salary of the chief clerk shall be three thousand dollars a year, of the assistant clerk two thousand dollars a year, of the bailiff fifteen hundred dollars a year, and of the messenger eight hundred and forty dollars a year, payable quarterly from the treasury. (Rev. Stats., sec. 1054.)

§ 633. **Clerk's bond.**—The chief clerk shall give bond to the United States in such amount, in such form, and with such security as shall be approved by the secretary of the treasury. (Rev. Stats., sec. 1055.)

§ 634. **Contingent fund.**—The said clerk shall have authority, when he has given bond as provided in the preceding section, to disburse, under the direction of the court, the contingent fund which may from time to time be appropriated for its use; and his accounts shall be settled by the proper accounting officers of the

treasury in the same way as the account of other disbursing agents of the government are settled. (Rev. Stats., sec. 1056.)

§ 635. Reports to Congress, copies for departments, etc.—On the first day of every December session of Congress, the clerk of the court of claims shall transmit to Congress a full and complete statement of all the judgments rendered by the court during the previous year, stating the amounts thereof, and the parties in whose favor they were rendered, together with a brief synopsis of the nature of the claims upon which they were rendered. And at the end of every term of the court he shall transmit a copy of its decisions to the heads of departments; to the solicitor, the comptrollers, and the auditors of the treasury; to the commissioners of the general land-office and of Indian affairs; to the chiefs of bureaus; and to other officers charged with the adjustment of claims against the United States. (Rev. Stats., sec. 1057.)

§ 636. Members of Congress.—Members of either house of Congress shall not practice in the court of claims. (Rev. Stats., sec. 1058.)

CHAPTER XXVI.

COURT OF CLAIMS—JURISDICTION.

- § 637. Jurisdiction—Suits against government—Proviso—"War" and rejected excepted.
- § 638. Set-off, counterclaims, etc.—Proviso—Limitation.
- § 639. District and circuit courts to have concurrent jurisdiction with court of claims—Limit.
- § 640. Petitions for release from official bond—Judgment—Limitation.
- § 641. Attorney-general to represent United States.
- § 642. Payment, discharge of obligation.
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- § 701. Court to make needful rules.
- § 702. Court to determine validity, amount, ownership of claims, etc.—Proviso as to testimony and law, and report conclusions.
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- § 705. Court to report to Congress, but finding and report to be taken only as advisory—Claims barred if not presented in two years.
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§ 637. Jurisdiction—Suits against government.—The court of claims shall have jurisdiction to hear and determine the following matters:—

First. All claims founded upon the constitution of the United States, or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable; *provided, however*, that nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil

war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same. (Rev. Stats., sec. 1059, as amended; 24 U. S. Stats. 505, sec. 1, cl. 1.)

Note.—This proviso, excluding from the jurisdiction of the courts therein mentioned claims "which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same," applies only to claims which have been adjudicated by a court, department, or commission authorized to determine between the parties, and not to claims which have been rejected in the ordinary process of presentation and audit. (*Stanton v. United States*, 37 Fed. Rep. 252. *Contra*, *Bliss v. United States*, 34 Fed. Rep. 781; *Rand v. United States*, 36 Fed. Rep. 671. See *Ward v. United States*, 10 Wall. 593.)

§ 638. Set-offs, counterclaims, etc.—Proviso—Limitations. — Second. All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court; *provided*, that no suit against the government of the United States shall be allowed under this act, unless the same shall have been brought within six years after the right accrued for which the claim is made. (Rev. Stats., sec. 1059, as amended; 24 U. S. Stats. 505, sec. 1, cl. 2.)

Note.—A claim against the United States is barred

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within six years after suit could be commenced thereon against the government. (*Finn v. United States*, 123 U. S. 227.) Amendments to a petition are always proper, as against the statute of limitation, when no new cause of action is introduced, although the original petition embraced the claim only by general allegations. (*Buck v. United States*, 25 Ct. of Cl. 120.)

§ 639. Concurrent jurisdiction.—The district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury. (24 U. S. Stats. 505, sec. 2.)

Note.—Act of March 3, 1887, to provide for bringing suits against the government, does not authorize equitable relief by suits for specific performance to compel the issue and delivery of a patent for land. (*United States v. Jones*, 131 U. S. 1; *U. S. v. Alire*, 6 Wall. 573; *Bonner v. U. S.*, 9 Wall. 156; *U. S. v. Gillis*, 95 U. S. 407; *U. S. v. Schurz*, 102 U. S. 378.)

§ 640. Release from official bond.—Whenever any person shall present his petition to the court of claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor,

or surety, or personal representative of any officer, or agent, or contractor so indebted, or that he, or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States has arisen and exists, and that he or the person he represents has applied to the proper department of the government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said department and to the attorney-general of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. (24 U. S. Stats. 505, sec. 3, cl. 1.)

§ 641. Attorney-general to represent United States.—The attorney-general shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court, or of the supreme court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive

upon the parties. (24 U. S. Stats. 505, sec. 3, cl. 2.)

§ 642. Payment, discharge of obligation.—The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court. Unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred. (24 U. S. Stats. 505, sec. 3, cl. 3.)

§ 643. Jurisdiction and procedure.—The jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt. (24 U. S. Stats. 505, sec. 4.)

§ 644. Petition for settlement of claims.—The plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the

clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and law. (24 U. S. Stats. 505, sec. 5.)

§ 645. Service of petition—Answer.—

The plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the attorney-general of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the government in the premises; *provided*, that

should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court. (24 U. S. Stats. 505, sec. 6.)

§ 646. **Opinions.**—It shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts. (24 U. S. Stats. 505, sec. 7.)

§ 647. **Interested parties may testify.**—In the trial of any suit brought under any of the provisions of this act, no person shall be excluded as a witness because he is a party to or interested in said suit; and any plaintiff or party in interest may be examined as a witness on the part of the government. Section ten hundred and seventy-nine of the Revised Statutes is hereby repealed. The provisions of section ten hundred and eighty of the Revised Statutes shall apply to cases under this act. (24 U. S. Stats. 505, sec. 8.)

§ 648. Appeals and writs of error—Procedure.—The plaintiff or the United States, in any suit brought under the provision of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes. (24 U. S. Stats. 505, sec. 9.)

§ 649. Appeal, when taken.—When the findings of fact and the law applicable thereto have been filed in any case as provided in section 6 of this act, and the judgment or decree is adverse to the government, it shall be the duty of the district attorney to transmit to the attorney-general of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the attorney-general shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same; *provided*, that no appeal or writ of error shall be allowed after six months from the judgment or decree

in such suit. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree. (24 U. S. Stats. 505, sec. 10.)

§ 650. Report to Congress.—The attorney-general shall report to Congress, and at the beginning of each session of Congress, the suits under this act in which a final judgment or decree has been rendered, giving the date of each, and a statement of the costs taxed in each case. (24 U. S. Stats. 505, sec. 11.)

§ 651. Claims referred by departments.—When any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court of claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted. (24 U. S. Stats. 505, sec. 12.)

§ 652. Claims referred under "Bowman act"—Judgment.—In every case which shall come before the court of claims, or is now

pending therein under the provisions of an act entitled "An act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the government," approved March third, eighteen hundred and eighty-three, if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provision of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either house of Congress, or to the department by which the same was referred to said court. (24 U. S. Stats. 505, sec. 13.)

§ 653. Reference of claims pending in Congress.—Whenever any bill, except for a pension, shall be pending in either house of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the house in which such bill is pending may refer the same to the court of claims, who shall proceed with the same in accordance with the provisions of the act approved March third, eighteen hundred and eighty-three, entitled an "act to afford assistance and relief to Congress and the executive departments in the investigation of claims and demands against the government," and report to such house the facts

in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy. (24 U. S. Stats. 505, sec. 14.)

§ 654. **Costs.**—If the government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court. (24 U. S. Stats. 505, sec. 15.)

§ 655. **Inconsistent laws repealed.**—All laws and parts of laws inconsistent with this act are hereby repealed. (24 U. S. Stats. 505, sec. 16. Approved March 3, 1887.)

§ 656. **Claims allowed by the first auditor and commissioner of customs.**—Full and complete jurisdiction is conferred by the appropriation act of July 7, 1884, sec. 3, on the court of claims, on claims allowed by the first auditor and commissioner of customs, as

to the expenses of collecting the revenue from customs prior to July 18, 1881, being the difference between amount paid and legal compensation fixed by Rev. Stats., secs. 2733, 2738. (Act of July 7, 1884; 23 U. S. Stats. 257.)

Jurisdiction in general.—This section does not violate the seventh amendment of the constitution of the United States. (*McElrath v. U. S.*, 102 U. S. 426.) This statute is remedial, and is to be liberally construed (*Brown v. U. S.*, 8 Ct. of Cl. 171); and where there is no redress elsewhere, the court should take jurisdiction (*Brown v. U. S.*, 8 Ct. of Cl. 181); but where Congress has provided a system adequate to the investigation and recovery of legal claims, and has intrusted specified executive or other officers with a judicial discretion, such claims cannot be enforced in the court of claims (*Boughton v. U. S.*, 12 Ct. of Cl. 330); and if a claimant institutes proceedings without presenting his claim to an executive department, he may be required to do so before relief will be granted (*Sweeney v. U. S.*, 5 Ct. of Cl. 285); but he cannot be required so to do before filing his petition. (*Clyde v. U. S.*, 13 Wall. 38; but see *Calkins v. U. S.*, 1 Ct. of Cl. 382.) If the government assumes to pay a certain claim, and provides a specific tribunal for the ascertainment thereof, the claimant cannot prosecute in the court of claims after the decision of that tribunal. (*Meade v. U. S.*, 9 Wall. 691.) Where the government recognizes an assignment of the claim, the parties to the agreement and those claiming under them cannot set up that the contract was not assignable. (*Goodman v. Niblack*, 102 U. S. 556.) The court of claims has no equitable jurisdiction. (*Bonner v. U. S.*, 9 Wall. 150.) An action to implead the United States and a state cannot be prosecuted in the court of claims. (*Mil. & R. R. Canal Co. v. U. S.*, 1 Ct. of Cl. 187.) Plaintiff, who has instituted proceedings in the court of claims to recover for lands condemned for public purposes, cannot then be heard to say that the law establishing the court is unconstitutional because it takes away the right of trial by jury and establishes a court unknown to the constitution. (*Great Falls Manuf. Co. v. Att'y-Gen.*, 124

U. S. 581; affirming S. C., 25 Fed. Rep. 521.) The jurisdiction of the court of claims over cases referred to it by either house of Congress is subject to provisions of general statutes of limitation regulating that jurisdiction. (*Ford v. United States*, 116 U. S. 213.) This court has jurisdiction of an action by a state against the United States, for a demand arising upon an act of Congress. (*United States v. Louisiana*, 123 U. S. 32.)

Law of Congress.—A claim founded on a law of Congress may be prosecuted in the court of claims. (*Alive v. U. S.*, 1 Ct. of Cl. 233; *Bogert v. U. S.*, 3 Ct. of Cl. 18.) An officer may prosecute a claim to recover salary allowed by act of Congress. (*Moore v. U. S.*, 4 Ct. of Cl. 139.) The owner of bonds assumed by the United States may maintain an action thereon in the court of claims (*Morrell v. U. S.*, 7 Ct. of Cl. 421); but a person who has attended as a witness before either house of Congress cannot prosecute an action to recover compensation. (*Lilley v. U. S.*, 14 Ct. of Cl. 539.) So a pension agent cannot prosecute when there is no provision of law for his compensation. (*Kapp v. U. S.*, Dev. Ct. Cl. 132.) Although an unauthorized purchase is ratified by Congress, yet an action in the court of claims for rent from time of purchase to time of ratification cannot be maintained. (*Carpenter v. U. S.*, 17 Wall. 489; S. C., 6 Ct. of Cl. 18.) So if the United States takes possession of land, under an Indian treaty, and as trustee for the Indians, the owner cannot prosecute an action to recover compensation in the court of claims. (*Langford v. U. S.*, 12 Ct. of Cl. 338.) Where, by an act of Congress, the secretary of the treasury is required to pay a certain claim against the United States, and no discretion in the premises is vested in him, the claimant is entitled to payment, and no suit lies to recover back the amount when paid, on the ground of mistake, unless Congress abrogates the law under which payment was made. (*United States v. Price*, 116 U. S. 43.) Neither the court of claims nor the supreme court of the United States can determine any claim against the United States, except in cases defined by Congress. (*United States v. Gleeson*, 124 U. S. 255; *De Groot v. United States*, 5 Wall. 419.) Claims against or liens upon prop-

erty of the United States are incapable of enforcement, except when such property becomes subject to the control of the courts. (*The Siren v. United States*, 7 Wall. 152.) The court of claims has jurisdiction of an action by a state against the United State for a demand arising upon an act of Congress. (*United States v. Louisiana*, 123 U. S. 32.)

Revenue laws.—An officer of the internal revenue may prosecute a claim to recover his salary. (*Patton v. U. S.*, 7 Ct. of Cl. 362.) An informer may prosecute his claim to recover his share of a forfeiture (*Shelton v. U. S.*, 8 Ct. of Cl. 487), but not if the secretary of the treasury has decided against his claim (*Ramsey v. U. S.*, 14 Ct. of Cl. 367); but if the money has been conveyed into the treasury, he may prosecute an action to recover his share. (*Bradley v. U. S.*, 12 Ct. of Cl. 578.) An importer cannot prosecute to recover money paid as a duty on imported goods, although the assessment was illegal (*Nichols v. United States*, 7 Wall. 122; *Doherty v. U. S.*, 6 Ct. of Cl. 901; *De Celis v. U. S.*, 13 Ct. of Cl. 117); but he may prosecute to recover money deposited by him in excess of the duties on goods received. (*Broulatour v. U. S.*, 7 Ct. of Cl. 555.) A manufacturer who has paid the tax imposed by the internal revenue cannot prosecute to recover the drawback allowed upon exportation of the goods (*Portland Co. v. U. S.*, 5 Ct. of Cl. 441); a manufacturer of matches may prosecute to recover the commission on stamps. (*Daily v. U. S.*, 7 Ct. of Cl. 383.) A distiller cannot prosecute to recover an allowance for leakage (*Turner v. U. S.*, 9 Ct. of Cl. 307); but a brewer may maintain an action for an excess on the payment of a special tax. (*U. S. v. Kaufman*, 96 U. S. 567; *U. S. v. Real Est. Sav. Bk.*, 104 U. S. 728.) A person who never attempts to perform his contract cannot prosecute a claim against the United States upon the ground that a different mode of inspection was adopted after the making of the contract. (*Spicer v. U. S.*, 1 Ct. of Cl. 316.) The court of claims has jurisdiction of a petition by an assessor of internal revenue to recover money deposited by him to secure the compromise of a prosecution, if the compromise is rejected, and the money conveyed into the treasury. (*Boughton v. U. S.*, 12 Ct. of Cl. 330.) An exporter entitled to a draw-

back may maintain suit therefor. (*Campbell v. U. S.*, 107 U. S. 407.) The allowance, by the commissioner of internal revenue, of a claim for taxes illegally or erroneously collected, may be used as the basis of an action in the court of claims. (*U. S. v. Real Estate Sav. Bank of Pittsburg*, 104 U. S. 728; see *Campbell v. United States*, 107 U. S. 407.)

Department regulations.—"Regulations of an executive department" describe rules and regulations made by the head of the department, under an act of Congress, and an order assigning a clerk to duty is not such a regulation. (*Harvey v. U. S.*, 3 Ct. of Cl. 38.)

Contracts express or implied.—The United States is not liable on a contract where the officer made it without authority, unless ratified, or the benefits were received. (*De Celis v. U. S.*, 13 Ct. of Cl. 117.) An implied contract cannot arise out of acts of an agent who had no power or authority to contract. (*Pitcher v. U. S.*, 1 Ct. of Cl. 7.) To constitute an implied contract there must be a consideration moving to the United States, or they must have received benefits from the property, or claimant must have a lawful right to the property. As in case of money paid by mistake. (*Knote v. U. S.*, 95 U. S. 149.) So where the United States receives money through the fraud of their agent. (*U. S. v. State*, 96 U. S. 30.) So the owner of land sold for the direct tax may prosecute an action in the court of claims to recover the surplus. (*Taylor v. U. S.*, 14 Ct. of Cl. 339.) A claim based upon an implied promise to repay money erroneously exacted is within the provisions of this section. (*Schlesinger v. U. S.*, 1 Ct. of Cl. 16.) A claim for salvage services may be prosecuted in the court of claims (*Brynn v. U. S.*, 6 Ct. of Cl. 128), or for delivery of goods, though the original contract made by another person was void. (*Heathfield v. U. S.*, 8 Ct. of Cl. 213.) The owner of land may prosecute a claim for compensation for the use thereof. (*Johnson v. U. S.*, 4 Ct. of Cl. 248.) The court of claims cannot render judgment for recovery on a military land warrant against the government (*U. S. v. Alire*, 6 Wall. 573; *Chamberlain v. U. S.*, 20 Law Rep. 631; *Jewett v. U. S.*,

23 Law Rep. 633); and although the United States disposes of land in violation of a trust, yet the holder of the warrant cannot enforce a claim arising from such breach. (*Bonner v. U. S.*, 9 Wall. 156.) When the government is liable on contract this court alone has jurisdiction. (*Case v. Terrell*, 11 Wall. 199; *Gibbons v. U. S.*, 8 Wall. 269.) It lies on an implied contract for services, equipment, and manning of a vessel in the service of governments (*U. S. v. Russell*, 13 Wall. 623), but not in case of impressment of a vessel. (*U. S. v. Kimbal*, 13 Wall. 636.) Where property is taken for public use the government is under an implied obligation to make compensation therefor. (*U. S. v. Great Falls M. Co.*, 112 U. S. 645.)

Claims referred.—If a claim is referred to the court or claims by an act of Congress, it is subject to all the restrictions imposed by the resolution. (*De Groot v. U. S.*, 5 Wall. 419; *Atocha v. U. S.*, 17 Wall. 430; *Roberts v. U. S.*, 92 U. S. 41; *Tillson v. U. S.*, 11 Ct. of Cl. 758; *Harvey v. U. S.*, 12 Ct. of Cl. 141; 13 Ct. of Cl. 322.)

§ 657. **Western Cherokee Indian claims.**—An act to authorize the court of claims to hear, determine, and render final judgment upon the claim of the old settlers or Western Cherokee Indians. (Feb. 25, 1889; 25 U. S. Stats. 694.)

§ 658. **Shawnee and Delaware Indian claims.**—An act to refer to the court of claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes. (Oct. 1, 1890; 26 U. S. Stats. 636.)

Set-off and counterclaim.—Demands of every kind, whether liquidated or unliquidated, may be set off against a claimant (*Allen v. U. S.*, 17 Wall. 207); as the amount due by a surety on a bond (*McKnight v. U. S.*, 98 U. S.

179); or a claim against an insolvent debtor for the proceeds of bonds unlawfully converted by him (*Allen v. U. S.*, 17 Wall. 207); or an assigned claim of a judgment debtor (*Macauley v. U. S.*, 11 Ct. of Cl. 693); or a claim for an internal revenue tax. (*Roman v. U. S.*, 11 Ct. of Cl. 761.) Where a set-off is pleaded in a suit brought by the United States, the refusal to direct the jury to certify the amount due will not be reviewed. (*Schaumburg v. U. S.*, 103 U. S. 667.) Verdict where a set-off in United States is in excess of the claim sued for (*Schaumburg v. U. S.*, 103 U. S. 667), the amount due from an officer for an income tax will not be deducted from his salary. (*Jones v. U. S.*, 4 Ct. of Cl. 197.) If no attempt is made to deduct the tax on the property, it cannot, after judgment, be deducted by the secretary of the treasury. (*U. S. v. O'Grady*, 22 Wall. 641.) It is the duty of the treasury department, through the accounting officers, to settle all claims and demands by and against the United States, and in proper cases to set off one against the other, when the government is both debtor and creditor of the same party. (*Howes v. U. S.*, 24 Ct. of Cl. 170.) Where an officer, after settlement with the government, sues it in the court of claims for back pay, it may recover against him moneys improperly paid to him before the settlement, which it has pleaded as a set-off. (*McElrath v. U. S.*, 102 U. S. 426.) An overpayment made to a former railroad company before the property passed by purchase to the present claimant, and before contract relations existed between the government and the present claimant, cannot be set up by way of counterclaim. (*Duval v. U. S.*, 25 Ct. of Cl. 46.) A substantive, independent claim cannot be recovered by a defendant from the state, by way of set-off, any more than by direct suit. (*Commonwealth v. Matlack*, 4 Dall. 303.)

Damages.—A patentee cannot maintain an action of damages for the infringement of a patent; so held where the warden of a penitentiary infringed the patent and paid the proceeds from the sale of the articles made to the United States (*Fletcher v. U. S.*, 11 Ct. of Cl. 748); but the government may be sued for the use of a patented invention (*Jones v. Campbell*, 3 Ct. of Cl. 440; *McKeever*

v. U. S., 14 Ct. of Cl. 396), or for the royalty which the government agrees to pay for its use. (U. S. v. Burns, 12 Wall. 246.) If the United States leases a piece of property, a claim for damages arising after the execution of the lease from the want of reasonable care in the use may be maintained in the court of claims. (U. S. v. Bostwick, 94 U. S. 53.) So a party who suffers loss from the refusal of government to accept goods according to contract may recover (Gibbons v. U. S., 8 Wall. 269); but the court of claims cannot try cases for merely nominal damages on breach of contract. (Grant v. U. S., 7 Wall. 331.) The court of claims has jurisdiction to entertain a claim for compensation for the use of a patented invention, upon an implied contract. (United States v. Palmer, 128 U. S. 262.) But an inventor in the government service, who allows the government to test his invention and bring it into practical use at its own cost before he applies for a patent, cannot claim an implied contract to pay him for its use. (Gill v. U. S., 25 Ct. of Cl. 415.) Where a claim for use of a patent has never been submitted to the government, or any pay for it asked, the fact that officers of the government have made unauthorized use of the invention does not create an implied contract within the jurisdiction. (Forehand v. U. S., 17 Wash. L. R. 37.) Where an employee devises an improvement and perfects the invention during working hours, the government paying all expenses and taking out the patent, no contract for royalty can be implied. (McAleer v. U. S., 25 Ct. of Cl. 238.) The infringement of a patent is not the taking of private property for public use, in the sense of the constitution; and the court of claims has no jurisdiction of a claim for infringement on that ground. (Forehand v. U. S., Ct. of Cl. 17 Wash. L. R. 37.)

Judgment.—The only judgment the court of claims can render against the government is one for money found due to the claimant. (U. S. v. Alire, 6 Wall. 573; U. S. v. Anderson, 9 Wall. 56; Brown v. U. S., 6 Ct. of Cl. 171.) If the proceeds of claimant's property is intermingled with that of other property, he is entitled to only his proportionate share of the mass (Sharp v. U. S., 12 Ct. of Cl. 638); and when the fund vanishes the jurisdiction of the

court is at an end. (Thomas v. U. S., 12 Ct. of Cl. 273; Sharp v. U. S., 12 Ct. of Cl. 638.) Although there is an error in a judgment in favor of a prior claimant for a part of the mass, the claimant is entitled to his full share. (Winchester v. U. S., 99 U. S. 372; Sevier v. U. S., 7 Ct. of Cl. 388.) A person who has paid a fine under sentence of a military commission organized in a state where the courts were open may prosecute an action to recover the money. (Devlin v. U. S., 12 Ct. of Cl. 266.) That the only judgment which is authorized is a money judgment, see Case v. Terrell, 11 Wall. 199; 20 L. Ed. 134; United States v. Jones, 131 U. S. 1. The court of claims cannot allow mere extra allowances where there is no promise to that effect, either express or implied. (Hawkins v. United States, 96 U. S. 689.)

Torts.—No demand founded on a tort can be prosecuted in the court of claims. (Gibbons v. U. S., 8 Wall. 269.) As a claim for damage to a building prior to the lease thereof (U. S. v. Bostwick, 94 U. S. 53); or for a loss arising from an arrest and false imprisonment (Spicer v. U. S., 1 Ct. of Cl. 316); or for damages by bombardment of a town (Perrin v. U. S., 12 Wall. 315); or for damages from a collision with a United States vessel (Dennis v. U. S., 2 Ct. of Cl. 210); or for the wrongful diversion of the proceeds of land by a state (M. & R. R. Canal Co. v. U. S., 1 Ct. of Cl. 187); or for taking possession of land by the government, by force, under a claim of title. (Langford v. U. S., 101 U. S. 341.) So if an officer after terminating a contract compels the contractor to perform it, the latter cannot prosecute for an additional offense above that stipulated. (Gibbons v. U. S., 8 Wall. 269.) The court of claims has no jurisdiction of a case growing out of an appropriation of property by the army or navy (Slawson v. U. S., 16 Wall. 310; Filor v. U. S., 9 Wall. 45); or for its destruction by the army or navy (Pugh v. U. S., 13 Wall. 633); or for injuries to a vessel by tortious acts of an officer. (Morgan v. U. S., 14 Wall. 531.) A claim cannot be maintained against the United States for indemnity on account of a judgment against the plaintiff in an action sounding in tort for acts done by him as an agent of the government. (Carpenter v. United States, 45 Fed. Rep.

341.) "Damages in cases not sounding in tort"—that is to say, damages for breach of contract—has already been held to be recoverable against the government under the former acts. (*United States v. Behan*, 110 U. S. 338; *United States v. Great Falls Mfg. Co.*, 112 U. S. 645; *Hollister v. Benedict & B. Mfg. Co.*, 113 U. S. 59, 67; *United States v. Jones*, 131 U. S. 1.) "A claim," in a just juridical sense, is a demand of some matter, as of right made by one person upon another, to do or to forbear to do some act or thing, as a matter of duty. (*Prigg v. Pennsylvania*, 16 Pet. 539.) Cases sounding in tort cannot be brought against the United States, under the act of Congress of March 3, 1887. (*Carpenter v. United States*, 42 Fed. Rep. 264.)

Disbursing officers.—The statute is designed to be prospective, and give relief where losses may occur, as well as where they have occurred (*Glenn v. U. S.*, 4 Ct. of Cl. 501); but if his responsibility has been discharged he is not entitled to relief (*Hall v. U. S.*, 9 Ct. of Cl. 270); nor unless the money was at the time under his control. (*Hall v. U. S.*, 9 Ct. of Cl. 270.) The United States is not bound by a settlement of accounts by the accounting officers (*McElrath v. U. S.*, 108 U. S. 426); but an acceptance without objection of the amount of an account by the government is an adjustment. (*Murphy v. U. S.*, 104 U. S. 464.) Although the court of claims prior to its reorganization allowed a claim, yet the allowance alone is not sufficient to support a claim. (*Nourse v. U. S.*, 2 Ct. of Cl. 214.)

Appropriation of property to public use.—The last proviso of subdivision 4 of this section divests the court of claims of jurisdiction over actions for the destruction or appropriation of or damage to property by the army or navy in suppression of the rebellion. (*Pugh v. U. S.*, 13 Wall. 633; *Corbett v. U. S.*, 1 Ct. of Cl. 139; *Raines v. U. S.*, 11 Ct. of Cl. 648; *Smith v. U. S.*, 14 Ct. of Cl. 189.) Appropriation means all-taking and use of property by the army and navy in the course of hostilities not authorized by contract (*Filor v. U. S.*, 9 Wall. 45); as taking possession of premises (*Bishop v. U. S.*, 4 Ct. of

Cl. 448), or money (*Pennsylvania Company v. U. S.*, 7 Ct. of Cl. 101), even where the officer taking the property promised to make payment, or gave vouchers (*Patterson v. U. S.*, 6 Ct. of Cl. 60); so if the leasing of the land was a mere incident to an unlawful appropriation (*Pugh v. U. S.*, 13 Wall. 633); or even if the owner voluntarily surrendered his property to the officer (*Lender v. U. S.*, 5 Ct. of Cl. 541); but if the officer took the premises under a contract, the claimant may prosecute his claim for rent (*Provine v. U. S.*, 5 Ct. of Cl. 455; see *Filor v. U. S.*, 9 Wall. 45); unless he made the contract without authority to do so. (*Slawson v. U. S.*, 16 Wall. 310; *Lindsley v. U. S.*, 4 Ct. of Cl. 359; *Filor v. U. S.*, 9 Wall. 45; *Ayres v. U. S.*, 3 Ct. of Cl. 1.) Where an officer under an urgent and immediate necessity took private property for public use, the owner is entitled to compensation. (*U. S. v. Russell*, 13 Wall. 623; *Grant v. U. S.*, 1 Ct. of Cl. 41.) If property was taken and used by a bureau in one of the executive departments, the owner may file a claim for compensation. (*Clark v. U. S.*, 1 Ct. of Cl. 145.) So if the war department took possession of property under an implied lease (*Walters v. U. S.*, 4 Ct. of Cl. 380); and if alterations are made in the premises the owner may claim for repairs. (*Provine v. U. S.*, 5 Ct. of Cl. 455.) Where the use of a vessel was taken with the understanding that a reasonable compensation should be paid, a petition for compensation may be filed. (*U. S. v. Russell*, 13 Wall. 623.) So where a vessel was chartered by the government, he may prosecute a claim for her value (*Bogert v. U. S.*, 2 Ct. of Cl. 159; 3 Ct. of Cl. 18); and where a loyal citizen offered to advance money to pay off a mortgage, and the military officer took it from him on account of the disloyalty of both mortgagor and mortgagee, he may recover the money in the court of claims. (*Mezeix v. U. S.*, 6 Ct. of Cl. 232.) By suing for compensation for land taken for a dam across the Potomac, claimant waives the right to have the compensation paid in advance. (*Great Falls Mfg. Co. v. Garland*, 124 U. S. 581.) The United States, in constructing, by authority of Congress, a necessary lighthouse upon soil under the water of the river, exercises a right in aid of the public right of navigation, and such use is not a taking of private property, within

the Fifth Amendment. (Hawkins Point Lighthouse Case, 39 Fed. Rep. 77.) Where the government uses hay belonging to a person, it is liable for its value, although there is no valid express contract to purchase the hay.) *U. S. v. Gill*, 20 Wall. 517.) Where property to which the United States asserts no title is taken by their officers or agents, the government is under an implied obligation to make just compensation to the owner. (*U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645; *Dunnington v. U. S.* (Ct. of Cl.) 17 Wash. L. Rep. 344.) The taking of private property by the government, although justified by an emergency of the public service in time of war or impending public danger, is within the constitutional provision regarding compensation. (*U. S. v. Russell*, 13 Wall. 623; *U. S. v. Irwin*, 127 U. S. 125.)

Captured or abandoned property.—If the property was sold after July 17, 1862, and before March 12, 1863, an action may be maintained for a recovery of the proceeds (*U. S. v. Pugh*, 99 U. S. 265; *Barringer v. U. S.*, 3 Ct. of Cl. 358; *Minor v. U. S.*, 6 Ct. of Cl. 393; *Terry v. U. S.*, 8 Ct. of Cl. 277; *Moore v. U. S.*, 10 Ct. of Cl. 375); but it has no jurisdiction over the proceeds of property used or intended to be used for carrying on war with the government. (*Slawson v. U. S.*, 16 Wall. 310; *Gearing v. U. S.*, 3 Ct. of Cl. 165.) A claimant may prosecute an action for the proceeds, although the property was condemned as prize. (*Winchester v. U. S.*, 99 U. S. 372; *Cook v. U. S.*, 9 Ct. of Cl. 288.) A claim for the proceeds of captured and abandoned property is barred after two years from August 20, 1868. (*U. S. v. Anderson*, 9 Wall. 56; *Haycraft v. U. S.*, 22 Wall. 81; *Grossmeyer v. U. S.*, 4 Ct. of Cl. 1; *H. v. U. S.*, 13 Ct. of Cl. 7; *Schaefer v. U. S.*, 4 Ct. of Cl. 529; *Persons v. U. S.*, 10 Ct. of Cl. 502); and the petition could not be filed till the rebellion was suppressed. (*Tibbetts v. U. S.*, 1 Ct. of Cl. 169; *S. C.*, 2 Ct. of Cl. 582.) A person whose property was confiscated during the rebellion cannot prosecute a claim to recover the proceeds, although he has received a pardon. (*Knote v. U. S.*, 95 U. S. 149.) This court has jurisdiction to render judgment against the United States for a specific sum in claims made under the abandoned and captured

property act. (*Spencer v. U. S.*, 91 U. S. 577; *Lamar v. Browne*, 92 U. S. 187.) A capture of property by a band of hostile Indians is not necessarily a capture by an enemy, within the meaning of the act providing for payment for property captured by an enemy. (*Guttman v. U. S.*, 18 Wall. 84.)

Recovery of proceeds.—A claimant must establish by sufficient proof that the captured or abandoned property came into the hands of the treasury agent, was sold, and the proceeds paid into the treasury, and that he was the owner and entitled to the proceeds. (*U. S. v. Anderson*, 9 Wall. 56; *Spencer v. U. S.*, 91 U. S. 577; *U. S. v. Ross*, 92 U. S. 281; *Bond v. U. S.*, 2 Ct. of Cl. 529; *Sharp v. U. S.*, 12 Ct. of Cl. 638; *Smith v. U. S.*, 14 Ct. of Cl. 189.) Proceeds of captured property in the hands of an officer whose duty it was to transmit them will be presumed to be in the treasury. (*Crussell v. U. S.* 14 Wall. 1; *U. S. v. Pugh*, 99 U. S. 265; *Henry v. U. S.*, 6 Ct. of Cl. 389; *Silvey v. U. S.*, 4 Ct. of Cl. 490; *Jenkins v. U. S.*, 8 Ct. of Cl. 464.) If disbursed in paying expenses of the military operation and for other purposes, claimant may prosecute for the proceeds, if the disbursements have been allowed by the accounting officers (*Hudnal v. U. S.*, 3 Ct. of Cl. 291; *Block v. U. S.*, 7 Ct. of Cl. 406; *Flecker v. U. S.*, 14 Ct. of Cl. 252); but where there is no proof that the money was paid into the treasury, or that it was expended for government use, it will not be presumed to be in the treasury. (*Cones v. U. S.*, 8 Ct. of Cl. 329; *Sharp v. U. S.*, 12 Ct. of Cl. 633; *Johnson v. U. S.*, 14 Ct. of Cl. 276.) So proof that the property came into possession of an employee of the treasury will not raise the presumption that the proceeds are in the treasury. (*Johnson v. U. S.*, 8 Ct. of Cl. 454.) A judgment creditor for the proceeds of captured property may sue in the court of claims if the secretary of the treasury deducts a sum for expenses not allowed in the judgment. (*Brown v. U. S.*, 6 Ct. of Cl. 171.) A party who had intrusted his business to an agent who invested in property which was afterwards captured may sue the United States for the net proceeds in the court of claims. (*U. S. v. Quigley*, 103 U. S. 595.) A disloyal person cannot waive his interest in captured prop-

erty in favor of one who is loyal where their property was intermingled. (*O'Keef v. U. S.*, 11 Wall. 178.) A petition filed to recover the proceeds of captured or abandoned property cannot be amended so as to claim the proceeds of other property after the time allowed by law for filing a petition has elapsed. (*Kidd v. U. S.*, 8 Ct. of Cl. 259; *Lamar v. U. S.*, 7 Ct. of Cl. 703.)

Property damaged or destroyed.—The terms in the statute "destruction of" and "damages to" embrace all destruction and damage arising from the ravages of war. (*Waters v. U. S.*, 4 Ct. of Cl. 389.) So a claim for damages arising from impressment of a vessel by a military officer cannot be prosecuted (*U. S. v. Kimbal*, 13 Wall. 636); but if the owner chartered her to the United States, and a military officer sank her for military purposes, the owner may prosecute his claim for her value. (*Bogart v. U. S.*, 2 Ct. of Cl. 159; 3 Ct. of Cl. 18.) Where the petition merely alleges destruction of property in one of the rebellious states, the presumption is, that it was done by the military forces. (*Pugh v. U. S.*, 13 Wall. 633.)

Amendment after two years.—A petition filed by a married woman cannot be amended by making her husband a party after the lapse of two years from the suppression of the rebellion (*Mount v. U. S.*, 11 Ct. of Cl. 509); but otherwise if the property of the wife under the state laws vested in him by marriage. (*Green v. U. S.*, 7 Ct. of Cl. 496.) The petition of a widow cannot be amended so as to make the administrator of her husband a party if the property belonged to him (*Thomas v. U. S.*, 11 Ct. of Cl. 722; 12 Ct. of Cl. 273); but the petition by the guardian of an infant may be amended by making the administrator a party even after the lapse of two years from the suppression of the rebellion. (*Cowan v. U. S.*, 5 Ct. of Cl. 106.) Where the petition fairly discloses the real claim and the real party in interest, and avers that it is filed for the use of an equitable claimant, it may be amended by substituting such claimant. (*Hail v. U. S.*, 11 Ct. of Cl. 704.) So the assignor may be substituted for the assignee. (*Payan v. U. S.*, 7 Ct. of Cl. 400.) If the petitioner is the party beneficially interested, the petition may

be amended by admitting new parties (*Cowan v. U. S.*, 5 Ct. of Cl. 106); but if not the party solely and really interested, it cannot. (*Hammer v. U. S.*, 13 Ct. of Cl. 7.) One who has not previously filed a petition cannot file an intervening petition after the lapse of two years from the suppression of the rebellion. (*Hill v. U. S.*, 8 Ct. of Cl. 361.)

§ 659. Private claims in Congress.—All petitions and bills praying or providing for the satisfaction of private claims against the government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract expressed or implied with the government of the United States, shall, unless otherwise ordered by resolution of the House in which they are introduced, be transmitted by the secretary of the Senate or the clerk of the House of Representatives, with all the accompanying documents, to the court of claims. (Rev. Stats., sec. 1060.)

Claims referred by Congress.—The jurisdiction of the court of claims over cases referred to it by either house of Congress is subject to provisions of general statutes of limitation regulating that jurisdiction. (*Ford v. United States*, 116 U. S. 213.) This court has jurisdiction of an action by a state against the United States for a demand arising upon an act of Congress. (*United States v. Louisiana*, 123 U. S. 32.)

§ 660. Judgments for set-off or counterclaim.—Upon the trial of any cause in which any set-off, counterclaim, claim for damages, or other demand is set up on the part of the government, against any person making claim against the government in said court, the

court shall hear and determine such claim or demand both for and against the government and claimant; and if upon the whole case it finds that the claimant is indebted to the government, it shall render judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases provided for by law. Any transcript of such judgment filed in the clerk's office of any district or circuit court shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such courts are enforced. (Rev. Stats., sec. 1061.)

Note.—This section is constitutional, although there is no provision for a jury trial. (*McElrath v. U. S.*, 12 Ct. of Cl. 312.) If no definite evidence is given of the counterclaim, it may be used to defeat it, but judgments will not be entered against claimant. (*Shrewsbury v. U. S.*, 13 Ct. of Cl. 183.) If the bankruptcy assignee of claimant becomes a party, the claim will be deducted from the counterclaim of the United States. (*Boughton v. U. S.*, 13 Ct. of Cl. 284; see *Allen v. U. S.*, 17 Wall. 207.)

§ 661. Decree on accounts of paymasters, etc.—Whenever the court of claims ascertains the facts of any loss by any paymaster, quartermaster, commissary of subsistence, or other disbursing officer, in the cases hereinbefore provided, to have been without fault or negligence on the part of such officer, it shall make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the treasury shall allow to such offi-

cer the amount so decreed, as a credit in the settlement of his accounts. (Rev. Stats., sec. 1062.)

Accounts of disbursing officers, etc.—A disbursing officer is bound to exercise that degree of care and diligence which a prudent man would require of his agent (*Malone v. U. S.*, 5 Ct. of Cl. 486); but what care and caution may require at one time may not be necessary at others. (*Glenn v. U. S.*, 4 Ct. of Cl. 501; *Malone v. U. S.*, 5 Ct. of Cl. 186.) If a disbursing officer puts money in a safe which is captured by the enemy, he is entitled to relief (*Christian v. U. S.*, 7 Ct. of Cl. 431); or if his clerk, who has a key, steals it and absconds (*Howell v. U. S.*, 7 Ct. of Cl. 512); or a robber enters his quarters during his temporary absence, and breaks open the safe (*U. S. v. Clark*, 96 U. S. 37; S. C., 11 Ct. of Cl. 698); or if he leaves his safe or box in a fort, and it is stolen (*Glenn v. U. S.*, 4 Ct. of Cl. 501); or if he keeps money in a chest in a building where other disbursing officers keep funds (*Prune v. U. S.*, 3 Ct. of Cl. 209); or if he puts his desk with money and vouchers on a transportation train which is captured by the enemy (*Murphy v. U. S.*, 3 Ct. of Cl. 212); or if, while carrying money in his breast pocket in the way such officers carry it, and he loses it, he is entitled to relief (*Whittelsey v. U. S.*, 5 Ct. of Cl. 452); or if he puts money in the room where he sleeps, and it is taken by burglars, he is entitled to relief. (*Malone v. U. S.*, 5 Ct. of Cl. 486.) The words "fault" or "negligence" must be taken in their common and popular sense, the former as error or mistake, and the latter as omission. (*Malone v. U. S.*, 5 Ct. of Cl. 486.) So a paymaster is guilty of negligence if he intrusts a large amount of money to an orderly to take to bank instead of taking it himself. (*Holman v. U. S.*, 11 Ct. of Cl. 642.)

§ 662. Claims referred by departments.—Whenever any claim is made against any executive department involving disputed facts or controverted questions of law, where the

amount in controversy exceeds three thousand dollars, or where the decision will effect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the constitution of the United States, the head of such department may cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the court of claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the secretary of the treasury may, upon the certificate of any auditor or comptroller of the treasury, direct any account, matter, or claim of the character, amount, or class described in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court for trial and adjudication; *provided*, that no case shall be referred by any head of a department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant. (Rev. Stats., sec. 1063.)

Reference of claims.—A claim may be referred by the head of a department at any time before payment (*Dela-ware Steamboat v. U. S.*, 5 Ct. of Cl. 55), although pre-

viously referred to accounting officers (Winnisimmet Co. v. U. S., 12 Ct. of Cl. 319); so of a claim for army transportation (Delaware Steamboat v. U. S., 5 Ct. of Cl. 55); or a claim for rent of land. (Bright v. U. S., 6 Ct. of Cl. 118.) It may be referred, although it involves a controversy between several claimants. (Bright v. U. S., 6 Ct. of Cl. 118.) The head of a department, on referring the cause, transmits the necessary papers. (Delaware Steamboat v. U. S., 5 Ct. of Cl. 55.) The presentation of a claim for rent of rooms for post-office purposes is sufficient to take the case referred under this section out of the operation of the statute of limitations. (Warder v. United States, 25 Ct. of Cl. 159.) A rule of the court of claims, which required that the claimant should have first gone through the department which might have entertained the claim before he could prosecute in that court, is void. (United States v. Clyde, 13 Wall. 35.)

§ 663. Procedure in cases transmitted by departments.—All cases transmitted by the head of any department, or upon the certificate of any auditor or comptroller, according to the provisions of the preceding section, shall be proceeded in as other cases pending in the court of claims, and shall, in all respects, be subject to the same rules and regulations. (Rev. Stats., sec. 1064.)

Cases transmitted.—Where the claimants contest and one fails to appear, a citation may issue (Bright v. U. S., 6 Ct. of Cl. 118); and the claimant must establish his claim by legal proof. (Bright v. U. S., 8 Ct. of Cl. 326.) Questions of law may be submitted for the decision of the court. (Amoskeag & C. Co. v. U. S., 6 Ct. of Cl. 99; Brouloutour v. U. S., 7 Ct. of Cl. 555.) The allowance of the claim by accounting officers does not make out a *prima facie* case. (McKnight v. U. S., 98 U. S. 179.)

§ 664. Judgments in cases transmitted by departments, how paid.—The amount of any final judgment or decree rendered in favor of the claimant, in any case transmitted to the court of claims under the two preceding sections, shall be paid out of any specific appropriation applicable to the case, if any such there be; and where no such appropriation exists, the judgment or decree shall be paid in the same manner as other judgments of the said court. (Rev. Stats., sec. 1065.)

Note.—Allowance of a judgment against a collector of internal revenue, by the commissioner and the secretary of the treasury, makes it a claim against the United States; and a judgment creditor may recover thereon in the court of claims. (United States v. Frerichs, 124 U. S. 315.) Its payment satisfies the demand. (Id.) The jurisdiction of the court of claims to find the facts, make conclusions of law, and give opinions in matters referred to it by heads of the executive departments, without entering judgments, is not restricted by the following section forbidding jurisdiction of claims dependent on a treaty. (Thingvalla Line v. U. S., 24 Ct. Cl. 255.)

§ 665. Judgments and claims subject to offsets.—That when any final judgment recovered against the United States or other claim duly allowed by legal authority shall be presented to the secretary of the treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United

States; and if such plaintiff or claimant asserts to such set-off, and discharges his judgment, or an amount thereof equal to said debt or claim, the secretary shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff or claimant denies his indebtedness to the United States, or refuses to consent to the set-off, then the secretary shall withhold payment of such further amount of such judgment, or claim, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such secretary, with six per cent interest thereon for the time it has been withheld from the plaintiff. (18 U. S. Stats. 481; 1 Sup. Rev. Stats. 185; Rev. Stats., sec. 1061 a.)

Note.—If the claimant consents that the debt be set off, accepts the balance, and discharges the judgment, he thereby waives his right to test its validity by legal proceedings. (*Bounafin v. U. S.*, 14 Ct. of Cl. 484.)

§ 666. Claims growing out of treaties.

—The jurisdiction of the said court shall not extend to any claim against the government not pending therein on December one, eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes. (Rev. Stats., sec. 1066.)

Note.—This court has no jurisdiction over claims of foreign governments, assumed by treaty. (Ex parte Atscha, 17 Wall. 439.) So of a treaty with the Indians. (Langford v. U. S., 12 Ct. of Cl. 338.) Under this section, the court of claims has no jurisdiction of a claim against the United States for money awarded by the mixed commission under the Mexican convention of 1868. (Alling v. United States, 114 U. S. 562.) Nor has it jurisdiction of a claim for a part of the money received from Great Britain in payment of the Geneva reward. (Great West Ins. Co. v. United States, 112 U. S. 193; Paulson v. U. S., 112 U. S. 193. But compare United States v. Weld, 127 U. S. 51, distinguishing the last two cases.) The French and American claims commission possessed no authority to consider any claims against the government of either the United States or of France, except as held, both at the time of their presentation and of judgment thereon, by citizens of the other country. (Burthe v. Denis, 133 U. S. 514.) The court of claims does not enter judgment in French spoliation cases, or determine what persons are entitled to the money which Congress may thereafter appropriate. (The Ganges, 25 Ct. of Cl. 110.) The obligation is founded on the law of nations, and the obligation on the offending government is perfect. (Emerson v. Hall, 13 Pet. 409.) The award of the French-American Commission is conclusive upon the validity of the claim, but not upon conflicting rights. (De Circe's Succession, 41 La. Ann. 506.) When paid to the executor it will be distributed in the course of administration. (Id.) Where the contention of plaintiffs in error, that they are entitled to an award rendered by the French and

American claims commission, is founded upon the French treaty of 1880, the decision of the supreme court of Louisiana against the rights thus asserted by them presents a question for the jurisdiction of the supreme court of the United States. (*Burthe v. Denis*, 133 U. S. 514.) Under the convention held in pursuance of the treaty between the United States and Mexico, awards by commissioners are final and conclusive as between the United States and Mexico, until set aside by agreement between the two governments or otherwise. (*Frelinghuysen v. United States ex rel.*, 110 U. S. 63.)

§ 667. Claims pending in other courts.

—No person shall file or prosecute in the court of claims, or in the supreme court on appeal therefrom, any claims for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States. (Rev. Stats., sec. 1067.)

§ 668. Aliens.—Aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, shall have the privilege of prosecuting claims against the United States in the court of claims, whereof such court, by reason of their subject-matter and character, might take jurisdiction. (Rev. Stats., sec. 1068.)

Aliens—When may prosecute claims.—Aliens of governments contemplated in this section may prosecute

claims against the United States, although such governments may reserve the right to deny the remedy on a few sporadic cases. (U. S. v. O'Keefe, 11 Wall. 178; Carlisle v. U. S., 16 Wall. 147.) If an alien was naturalized before the adoption of this section he may prosecute his action (Bulwinkle v. U. S., 4 Ct. of Cl. 395; Mentz v. U. S., 4 Ct. of Cl. 471), and if naturalized before the plea of alienage, he may prosecute an action commenced before its adoption. (Scharfer v. U. S., 4 Ct. of Cl. 529; Warner v. U. S., 5 Ct. of Cl. 637.) The right is granted fully under this section, although a citizen of the United States is required to give security for costs. (Brown v. U. S., 5 Ct. of Cl. 571.) The following governments accord to citizens of the United States the right to prosecute claims in their courts, to wit: Belgium: *De Give v. U. S.*, 7 Ct. of Cl. 577; France: *Rothschild v. U. S.*, 6 Ct. of Cl. 204; Dauphin v. U. S., 6 Ct. of Cl. 221; Great Britain: *U. S. v. O'Keefe*, 11 Wall. 178; *Carlisle v. U. S.*, 16 Wall. 147; Italy: *Fichera v. U. S.*, 9 Ct. of Cl. 254; Prussia: *Brown v. U. S.*, 5 Ct. of Cl. 571; Spain: *Nohing v. U. S.*, 6 Ct. of Cl. 269; Switzerland: *Lobsiger v. U. S.*, 5 Ct. of Cl. 687. The jurisdiction of a commission appointed under a treaty to pass upon a war claim of an alien is limited to the determination of the validity of the claim. (*Bodemüller v. United States*, 39 Fed. Rep. 437.) After it has been passed upon by a commission, a cause of action for a recovery of the amount awarded is not against the government of which the alien was a citizen, where it is not shown that the money was paid to that government for his benefit. (*Bodemüller v. United States*, Id.) Where a deduction is made on the ground that one of the heirs is a citizen of Louisiana, where there is no proof of his right to sue therefor, suit must be brought by the administratrix, and not by the heir. (Id.)

§ 669. Limitation.—Every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court, or transmitted to it by the secretary

of the Senate or the clerk of the House of Representatives, as provided by law, within six years after the claim first accrues; *provided*, that the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. (Rev. Stats., sec. 1069.)

Limitations.—This section provides that every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court within six years after the claim first accrues. (U. S. v. Taylor, 104 U. S. 221.) The claim is barred unless the petition is filed within six years after it accrued (Bell v. U. S., 20 Wall. 179; McKnight v. U. S., 98 U. S. 179; Cross v. U. S., 4 Ct. of Cl. 271; Carter v. U. S., 6 Ct. of Cl. 31; Bulkeley v. U. S., 8 Ct. of Cl. 517; Campbell v. U. S., 13 Ct. of Cl. 108); but the petition may be amended although more than six years have elapsed. (Griffin v. U. S., 13 Ct. of Cl. 257; Devlin v. U. S., 12 Ct. of Cl. 266.) So it is not necessary that the limitation be pleaded, as the court is bound to take cognizance of the statute, and inquire whether it appears on the face of the pleadings and evidence that the period had not expired when the petition was filed. (Kendall v. U. S., 14 Ct. of Cl. 122.) The court of claims has authority to hear and determine the claim of any disbursing officer for relief from responsibility on account of capture or other loss of funds

while in the line of his duty. (*U. S. v. Clark*, 96 U. S. 37.) The limitation applies to a postmaster for relief for money stolen from him when government has refused to allow his claim. (*U. S. v. Smith*, 105 U. S. 620.) The limitation does not apply to suits pending at the time of its adoption (*Parlin v. U. S.*, 1 Ct. of Cl. 174); nor to claims which had been referred by the head of an executive department for its judicial determination, provided it was presented within six years after it accrued (*U. S. v. Lippitt*, 100 U. S. 663; *Winnisimmet Co. v. U. S.*, 12 Ct. of Cl. 319); nor does it apply to claims for proceeds of captured and abandoned property. (*Tibbitts v. U. S.*, 1 Ct. of Cl. 169; *S. C.*, 2 Ct. of Cl. 582.) No exception not found in the statute can be ingrafted. (*Cross v. U. S.*, 4 Ct. of Cl. 271.) If claimant dies before the claim is due the statute will not begin to run until an administrator is appointed (*Falenweider v. U. S.*, 9 Ct. of Cl. 403); but its operation is not suspended by his death if it accrued in his lifetime (*Sierra v. U. S.*, 9 Ct. of Cl. 224); nor will the payment of part of the debt take the claim out of the statute. (*U. S. v. Wilder*, 13 Wall. 254.) If claimant was an inhabitant of an insurrectionary state, and the claim accrued during the civil war, the statute runs from the time of the suppression of the rebellion (*Sierra v. U. S.*, 9 Ct. of Cl. 224), and not from the date of the proclamation of pardon and amnesty. (*Kendall v. U. S.*, 14 Ct. of Cl. 374.) A collector of customs' claim for his salary accrues at the end of each fiscal year, and the statute runs from that time (*Bachelor v. U. S.*, 8 Ct. of Cl. 235; *Ellsworth v. U. S.*, 14 Ct. of Cl. 582); and for money paid into the treasury which he is entitled to retain the statute runs from its payment. (*Lawson v. U. S.*, 14 Ct. of Cl. 332.) So a cause of action accrues upon the refusal of the secretary of the treasury to pay money, the surplus proceeds of land sold for a district tax. (*Taylor v. U. S.*, 14 Ct. of Cl. 339.) A claim for money arises when it is paid into the treasury (*Clark v. U. S.*, 99 U. S. 493); but for money lost by claimant the statute does not begin to run until the accounting officers of the treasury refuse to recognize the claim as a valid credit. (*U. S. v. Clark*, 96 U. S. 37; *Smith v. U. S.*, 14 Ct. of Cl. 114.) On a contract for sale of goods the statute runs from the time

the price is payable. (*Batelle v. U. S.*, 7 Ct. of Cl. 297.) Where the court has jurisdiction of matter offered in evidence the statute is no bar to a defense involving such matters. (*U. S. v. Clark*, 96 U. S. 43.) The statute of limitations begins to run against a claim for the surplus proceeds of lands sold for taxes, under the act of 1861, from the date of the demand therefor upon the secretary of the treasury. (*U. S. v. Lawton*, 110 U. S. 146; approving *U. S. v. Taylor*, 104 U. S. 216.) The general rule that limitation does not operate by its own force as a bar, but is a defense which must be set up to be availed of, does not apply to suits in the court of claims against the United States. (*Finn v. United States*, 123 U. S. 227.) The limitation of six years in this section applies to a claim of the state for moneys due to it from the five-percent fund. (*U. S. v. Louisiana*, 127 U. S. 182.) It applies to a claim for relief by a paymaster in the army for money stolen from him, and which he has replaced and paid over. (*U. S. v. Smith*, 105 U. S. 620; distinguishing *U. S. v. Clark*, 96 U. S. 43.) An action by the state to recover moneys received by the United States from sale of swamp-lands is not barred until six years after the amount is ascertained by the commissioner of the general land-office. (*United States v. Louisiana*, 123 U. S. 32.) A claim on behalf of a United States marshal for the allowance by the government, of expenses incurred by him in the service for it of a distress warrant, which accrued more than forty-seven years before it was presented to the treasury department, is a stale claim, which the accounting officers have no right to receive, examine, or settle. (*Waddell v. U. S.*, 7 L. R. A. 861; 25 Ct. of Cl.)

§ 670. Rules of practice—Contempts.—

The said court shall have power to establish rules for its government and for the regulation of practice therein, and it may punish for contempt in the manner prescribed by the common law, may appoint commissioners, and may exercise such powers as are necessary to carry

into effect the powers granted to it by law. (Rev. Stats., sec. 1070.)

Note.—A motion for an order upon the court of claims to make and return additional findings will be denied, unless it has first been submitted to such court in a written request, as required by the rule. (United States v. Driscoll, 96 U. S. 421.)

§ 671. Oaths and acknowledgments.
—The judges and clerks of said court may administer oaths and affirmations, take acknowledgments of instruments in writing, and give certificates of the same. (Rev. Stats., sec. 1071.)

§ 672. Petition.—The claimant shall, in all cases, fully set forth in his petition the claim, the action thereon in Congress, or by any of the departments, if such action has been had; what persons are owners thereof or interested therein, when and upon what consideration such persons became so interested; that no assignment or transfer of said claim, or of any part thereof or interest therein, has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; that the claimant, and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the government of the United States, and, whether a citizen or not, has not

in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, and that he believes the facts as stated in the said petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent, or attorney. (Rev. Stats., sec. 1072.)

Petition, what to contain.—The petition must set forth claimant's case with precision, and without ambiguity, and its allegations will be construed most strongly against the claimant. (Merch. Exch. Co. v. U. S., 1 Ct. of Cl. 332; Guttman v. U. S., 6 Ct. of Cl. 111.) It must set forth the facts upon which the right to recover rests (Merch. Exch. Co. v. U. S., 1 Ct. of Cl. 332; Brown v. U. S., 1 Ct. of Cl. 377; Baird v. U. S., 5 Ct. of Cl. 348; 8 Ct. of Cl. 13; Guttman v. U. S., 6 Ct. of Cl. 111; Monk v. U. S., 12 Ct. of Cl. 293; Morgan v. U. S., 14 Ct. of Cl. 442); and the persons who are owners of the claim or interested therein (White v. U. S., Dev. Ct. Cl. 134); and an alien must aver that he never in any way aided, abetted, or encouraged the rebellion (Hill v. U. S., 8 Ct. of Cl. 470); or if he did, that he had been pardoned. (Pargoud v. U. S., 13 Wall. 156; *contra*, Brockett v. U. S., 2 Ct. of Cl. 213.) It must state the amount of the claim or relief demanded (Patterson v. U. S., 6 Ct. of Cl. 60); for money illegally exacted as duties it must aver that a protest was made as required by law (Schlessinger v. U. S., 1 Ct. of Cl. 16; Nicoll v. U. S., 1 Ct. of Cl. 70); and if founded on an act of Congress, it must refer to the act. (Noble v. U. S., Dev. Ct. Cl. 134.) It must set forth some legal disabilities to remove the bar of the statute where it shows the claim accrued more than six years before its filing (Kendall v. U. S., 14 Ct. of Cl. 122; Kendall v. U. S., 14 Ct. of Cl. 374); but the disability of one who indorsed a draft, and passed it away before the rebellion, will not avail the holder. (Peirce v. U. S., 1 Ct. of Cl. 195.) It need not set forth the evidence to be used to prove the facts set forth. (Noble v. U. S., Dev. Ct. Cl. 134.) If defective in its averments it may be amended

(Jones v. U. S., 1 Ct. of Cl. 183); but not without leave of court (Shaw v. U. S., 9 Ct. of Cl. 301); as by substituting the assignor (Cote v. U. S., 3 Ct. of Cl. 64); or so as to make a ward party on his coming of age. (Stanton v. U. S., 4 Ct. of Cl. 456.) So on a petition to recover rent due on installments, a party may amend so as to include the entire rent. (Cross v. U. S., 14 Wall. 479.) If a claimant sets forth, by way of petition, a plain statement of the facts without technical formality, and prays relief, either in a general manner or in an alternative or cumulative form, the court should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to. (United States v. Behan, 110 U. S. 238; Clark v. United States, 95 U. S. 539.) The court of claims, in deciding upon the rights of claimants, is not bound by any special rules of pleading. (United States v. Burns, 12 Wall. 246.) If the petition shows that plaintiff's claim is founded on acts of officers of the government, which are authorized by Congress, it is immaterial whether the petition claims compensation as upon an implied contract or for damages. (Chappell v. United States, 34 Fed Rep. 673.)

Who may petition. — If a chose in action has been assigned the assignor may sue for the benefit of the assignee (Jackson v. U. S., 1 Ct. of Cl. 260; Crowell v. Jackson, 6 Ct. of Cl. 23); but the assignee must be connected with the case (Silverhill v. U. S., 5 Ct. of Cl. 610); and the connection of the assignor may be shown by his verification, or by warrant of attorney, or by proof of the transfer. (Silverhill v. U. S., 5 Ct. of Cl. 610.) A corporation created in an insurrectionary state may petition (U. S. v. Insurance Co., 22 Wall. 99); and if joint owners join they may amend so as to sever in the prayer for relief, and ask for separate judgment on the merits. (Mott v. U. S., 3 Ct. of Cl. 218.) A *feme covert* under the laws of the state may file a petition in her own name. (Stanton v. U. S., 4 Ct. of Cl. 456; Meriwether v. U. S., 13 Ct. of Cl. 259.) A petition may be filed in the state by a guardian, where the ward has his domicile. Stanton v. U. S., 4 Ct. of Cl. 456.) The assignee of a chose in action not a commercial instrument cannot maintain an action in

his own name. (U. S. v. Gillis, 95 U. S. 407; Atocha v. U. S., 17 Wall. 439; Jackson v. U. S., 1 Ct. of Cl. 260; Sines v. U. S., 1 Ct. of Cl. 12; Cote v. U. S., 3 Ct. of Cl. 64; Johnston v. U. S., 13 Ct. of Cl. 217.) If the assignment merely transfers a part interest the suit cannot be brought to the use of assignee. (Raines v. U. S., 11 Ct. of Cl. 648.) The provisions of this section have no application to a sale prior to seizure of captured and abandoned property. (Bates v. U. S., 4 Ct. of Cl. 569.) On an assignment for benefit of creditors the trustees may prosecute in the name of the assignor. (Morgan v. U. S., 14 Ct. of Cl. 319.) If a claimant becomes bankrupt the assignee may prosecute the suit. (Persons v. U. S., 8 Ct. of Cl. 542.) And a purchaser from the assignee is entitled to be substituted. (Burke v. U. S., 13 Ct. of Cl. 231.) A party who asserts a claim must prove the transfer, and the nature and extent of his right. (Tebbets v. U. S., 5 Ct. of Cl. 607; Crowell v. U. S., 6 Ct. of Cl. 23.) A decree in a state court, appointing a receiver, and authorizing him to sue in the court of claims, has no force in the latter court, and a suit by him will be dismissed. (Howes v. U. S., 24 Ct. of Cl. 170.) One who is not a party to a contract, either originally or by substitution, cannot maintain a claim before the court of claims for compensation under it. (Kellogg v. U. S., 7 Wall. 361.)

Interest of parties.—If a claimant proceeds alone when jointly interested he must show the extent of his interest (Headman v. U. S., 5 Ct. of Cl. 640); and although there are two contractors yet one may file the petition alone if the other is disqualified. (U. S. v. Burns, 12 Wall. 246; Fain v. U. S., 4 Ct. of Cl. 237; Mildrum v. U. S., 7 Ct. of Cl. 595.) Several parties may join in a petition although they brought it in severally. (Rutherford v. U. S., 1 Ct. of Cl. 481.) All who have an interest should join (Hale v. U. S., Dev. Ct. Cl. 137); but if they have separate interests they cannot join (Wilson v. U. S., 1 Ct. of Cl. 318; Parish v. U. S., 1 Ct. of Cl. 345), and a change of parties may be allowed to sustain and protect the original cause of action. (Bellocque v. U. S., 8 Ct. of Cl. 493.) If two persons join when only one is entitled to the claim, the petition may be amended by striking out

the name of the other party. (*Molina v. U. S.*, 6 Ct. of Cl. 269.) If claimants are partners the disloyalty of one partner defeats the action. (*Schreiner v. U. S.*, 6 Ct. of Cl. 359.) A partner cannot intervene and claim the same property as that claimed by the firm. (*Bellocque v. U. S.*, 8 Ct. of Cl. 493.) Although one person is a member of two separate firms yet the firms cannot unite in one petition. (*Parish v. U. S.*, 1 Ct. of Cl. 345.) If a *feme covert* and her husband file a joint petition, and he dies, she may prosecute alone in her own name (*Roddin v. U. S.*, 6 Ct. of Cl. 308); and where the husband is sole owner of the claim the name of the wife may be stricken out. (*Benton v. U. S.*, 5 Ct. of Cl. 692.) If a person claims money not already claimed he may intervene in the pending suit. (*Mezeix v. U. S.*, 6 Ct. of Cl. 232; *Turner v. U. S.*, 2 Ct. of Cl. 390.) On a petition by a firm claiming certain property a partner cannot intervene and claim the same property. (*Bellocque v. U. S.*, 8 Ct. of Cl. 493.) If a person files a petition to recover bonds alleged to be illegally held by others, the service of citation will not bring the parties within the jurisdiction unless they come in voluntarily and prosecute a cross-action. (*Texas v. U. S.*, 7 Ct. of Cl. 301.) A contractor is bound by the settlement made with a party whom he permits to file a petition in his name. (*Stow v. U. S.*, 19 Wall. 13.)

Claim by agent.—Although an agent makes a contract in his own name without disclosing his principal, yet the principal may petition in his own name (*Ramsdell v. U. S.*, 2 Ct. of Cl. 508), or the petition may be filed in the name of the agent for the use of the principal (*Ramsdell v. U. S.*, 2 Ct. of Cl. 508); and it may be amended to show that the action is prosecuted for the use of another (*Shaw v. U. S.*, 9 Ct. of Cl. 301); and when an action is brought in the name of one person for the use of another, the money is paid to the real party in interest. (*Crowell v. U. S.*, 6 Ct. of Cl. 23.)

Attorney and client.—A partner of a firm cannot have his attorney associated with the attorney of the firm. (*Bellocque v. U. S.*, 8 Ct. of Cl. 493.) An assignee in bankruptcy succeeding a claimant may discharge an attor-

ney upon paying his disbursements. (*Johnson v. U. S.*, 11 Ct. of Cl. 724.) If petitioner desires to change his attorney he must repay all disbursements and give his attorney a lien for his fees (*Desmare v. U. S.*, 9 Ct. of Cl. 1; *Carver v. U. S.*, 7 Ct. of Cl. 499); and an executor or administrator can only change the attorney on the usual terms. (*Johnson v. U. S.*, 11 Ct. of Cl. 724.) A client may change his attorney and employ other counsel. (*Carver v. U. S.*, 7 Ct. of Cl. 499.)

Commingleing of rights.—If the goods of several owners are commingled the claims of the several claimants may be consolidated. (*U. S. v. Raymond*, 92 U. S. 651; *Woodruff v. U. S.*, 4 Ct. of Cl. 486.) So if assignees of vouchers under one contract bring separate suits they may be consolidated. (*Crowell v. U. S.*, 6 Ct. of Cl. 23.) If the suits of several claimants are united the first claimant will have to make out his claim against the United States only, and the junior claimant will have to make his title good against first claimant. (*Woodruff v. U. S.*, 4 Ct. of Cl. 486.) If suits for the same fund are united no testimony can be used unless the party has had an opportunity to cross-examine the witness. (*Woodruff v. U. S.*, 4 Ct. of Cl. 486; *Boyd v. U. S.*, 9 Ct. of Cl. 419.)

Pleading.—The pleadings need not present a single issue; the substance rather than the technicalities will be regarded. (*Peirce v. U. S.*, 1 Ct. of Cl. 195; *Benton v. U. S.*, 5 Ct. of Cl. 602; *Baird v. U. S.*, 8 Ct. of Cl. 13.) Where the objection goes to the jurisdiction it should be taken by plea (*Peirce v. U. S.*, 1 Ct. of Cl. 195; *Penn. Co. v. U. S.*, 7 Ct. of Cl. 401), and such plea may be filed after the general issue (*Peirce v. U. S.*, 1 Ct. of Cl. 195); but where the objection goes to the right of claimant to recover, it should be taken by demurrer or plea (*Penn. Co. v. U. S.*, 7 Ct. of Cl. 401); and a special demurrer cannot allege a fact not stated in the petition. (*Graham v. U. S.*, 1 Ct. of Cl. 183.) If a traverse has been filed a plea to the jurisdiction should not be filed without leave of court. (*Peirce v. U. S.*, 1 Ct. of Cl. 195.) If the United States does not traverse an allegation of loyalty it will be presumed true (*Hill v. U. S.*, 8 Ct. of Cl. 470); and if it files

a general traverse that it is not verified it waives the want of verification. (Griffin v. U. S., 13 Ct. of Cl. 257.) A traverse requires claimant to establish all material allegations by proof. (Calkins v. U. S., 1 Ct. of Cl. 382.)

Verification of petition.—If the petition is not verified, a motion may be made to dismiss it (Griffin v. U. S., 13 Ct. of Cl. 257); or an amended petition properly verified may be filed. (Griffin v. U. S., 13 Ct. of Cl. 257.) If the assignor dies *pendente lite* the verification of his executor to an amended petition sufficiently connects him with the case. (Pullen v. U. S., 7 Ct. of Cl. 507.) If a petition presented by a firm avers a joint title, and is verified by one partner, judgment will be rendered in favor of the firm. (Richmond v. U. S., 7 Ct. of Cl. 533.)

Evidence.—If there is an omission to furnish certain proof the case may be remanded for further proof even after final hearing (Kirby v. U. S., 3 Ct. of Cl. 265; Daniels v. U. S., 5 Ct. of Cl. 65; Mahan v. U. S., 5 Ct. of Cl. 331; Fendall v. U. S., 12 Ct. of Cl. 305); but it would not be remanded where there is a conflict of testimony. (Crowell v. U. S., 6 Ct. of Cl. 23; Shrewsbury v. U. S., 13 Ct. of Cl. 183.) Where a case is remanded for further proof either party may take further testimony on every fact (Culliton v. U. S., 5 Ct. of Cl. 627); and a witness may be re-examined. (Gaither v. U. S., 3 Ct. of Cl. 191.) If there are documents that are not competent evidence the case may be remanded to give opportunity to stipulate concerning it. (Lender v. U. S., 5 Ct. of Cl. 544.)

§ 673. **Petition, when dismissed.**—The said allegations as to true allegiance and voluntary aiding, abetting, or giving encouragement to rebellion against the government may be traversed by the government, and if on the trial such issues shall be decided against the claimant, his petition shall be dismissed. (Rev. Stats., sec. 1073.)

Note.—Where a person struggling to maintain his legal right to his slaves voluntarily continued his domicile within the territory of the power devoted to the maintenance of slavery, it may be inferred that he desired its success and was not loyal in fact. (*Austin v. United States*, 25 Ct. of Cl. 437.)

§ 674. Burden of proof and evidence as to loyalty.—Whenever it is material in any claim to ascertain whether any person did or did not give any aid or comfort to the late rebellion, the claimant asserting the loyalty of any such person to the United States during such rebellion shall be required to prove affirmatively that such person did, during said rebellion, consistently adhere to the United States, and did give no aid or comfort to persons engaged in such rebellion; and the voluntary residence of any such person in any place where, at any time during such residence, the rebel force or organization held sway, shall be *prima facie* evidence that such person did give aid and comfort to said rebellion, and to the persons engaged therein. (Rev. Stats., sec. 1074.)

Note.—An express proviso in a private act, that it be shown "to the satisfaction of the court" that neither the owner nor any of his surviving representatives gave any aid or comfort to the late rebellion, but "were throughout the war loyal to the government," means that they must have been loyal in fact, and not merely have legal loyalty derived from the proclamation of general amnesty. (*Austin v. United States*, 25 Ct. of Cl. 437.)

Aid and comfort.—To constitute "aid and comfort" to persons engaged in the rebellion the acts must

have been committed with the intention of aiding the rebellion (*Grossmeyer v. U. S.*, 4 Ct. of Cl. 1); and that the aid and comfort was given must be shown (*Hill v. U. S.*, 3 Ct. of Cl. 470), and any acts which tend to assist, countenance, or encourage constitute the aid and comfort. (*Bond v. U. S.*, 2 Ct. of Cl. 528; *Bates v. U. S.*, 4 Ct. of Cl. 569.) So engaging in the rebellion was aid to it (*Grossmeyer v. U. S.*, 6 Ct. of Cl. 1); or serving on the reserved force if he could have avoided it (*Kuper v. U. S.*, 3 Ct. of Cl. 74); or being voluntarily connected with a violation of the blockade (*Bates v. U. S.*, 4 Ct. of Cl. 560); but not unless the adventure was put afloat. (*Hill v. U. S.*, 8 Ct. of Cl. 470.) So becoming surety on an official bond of a military officer of the rebellion is aid to the rebellion (*U. S. v. Padelford*, 9 Wall. 531), or selling goods to an agent of the rebel government (*Carlisle v. U. S.*, 16 Wall. 147); but offices and acts of affection and humanity by persons to individuals engaged in the rebellion do not come within the interdiction of the statute. (*Grossmeyer v. U. S.*, 4 Ct. of Cl. 1.) A claimant is entitled to prosecute if the aid and comfort were not voluntarily given (*U. S. v. Padelford*, 9 Wall. 531); so taxes paid under compulsion do not constitute aid and comfort to the rebellion. (*Grossmeyer v. U. S.*, 4 Ct. of Cl. 1.) If claimant is a mere trustee he must make proof of the loyalty of the beneficiaries of the trust (*Stoddart v. U. S.*, 6 Ct. of Cl. 230); but if an administrator was owner of the property at the time of capture or abandonment, his right to recover the proceeds depends on his own loyalty. (*Carrol v. U. S.*, 13 Wall. 351.)

Proof of loyalty. — This section does not essentially change the nature of proof required by prior statutes. (*U. S. v. Padelford*, 9 Wall. 531; *Grossmeyer v. U. S.*, 4 Ct. of Cl. 1.) If claimant has not obtained a pardon he must prove his loyalty. (*U. S. v. Burns*, 12 Wall. 246; *Patterson v. U. S.*, 6 Ct. of Cl. 40; *Deeson v. U. S.*, 6 Ct. of Cl. 227; *S. C.*, 5 Ct. of Cl. 626.) And very slight evidence is sufficient to establish the loyalty of a colored citizen of the rebel states. (*Thomas v. U. S.*, 3 Ct. of Cl. 52; *Dereef v. U. S.*, 3 Ct. of Cl. 163.) Evidence of any act which tended to support the rebellion where no other

motive is apparent is evidence of bad intention. (*Grossmeyer v. U. S.*, 4 Ct. of Cl. 1.) An alien need not prove that he did not adhere to the United States; it is sufficient that he observed a neutral course (*Rothschild v. U. S.*, 6 Ct. of Cl. 204), and his residence in a foreign country raises the presumption that he preserved his neutrality. (*Hill v. U. S.*, 8 Ct. of Cl. 470.) The presumption of loyalty is in favor of one who was citizen and resident of a loyal state. (*Turner v. U. S.*, 3 Ct. of Cl. 400.)

Effect of pardon.—The proclamation of pardon and amnesty relieves the claimant who is within its terms from the necessity to prove that he gave no aid to the rebellion. (*Armstrong v. U. S.*, 13 Wall. 154; *Pargoud v. U. S.*, 13 Wall. 156; *Carlisle v. U. S.*, 16 Wall. 147; *Haym v. U. S.*, 7 Ct. of Cl. 443; *Waring v. U. S.*, 7 Ct. of Cl. 504; but see *Mills v. U. S.*, 6 Ct. of Cl. 253.) So taking the oath of amnesty blots out the offense. (*U. S. v. Padelford*, 9 Wall. 53; *U. S. v. Klein*, 13 Wall. 128; *Hamilton v. U. S.*, 7 Ct. of Cl. 444; *Backer v. U. S.*, 7 Ct. of Cl. 551; *Hardie v. U. S.*, 8 Ct. of Cl. 316; but see *Brocket v. U. S.*, 2 Ct. of Cl. 213.) If the owner died before issuance of the proclamation, the administrator cannot recover unless he proves decedent did not give aid and comfort to the rebellion. (*Meldran v. U. S.*, 7 Ct. of Cl. 595; *Scott v. U. S.*, 8 Ct. of Cl. 457; *Sierra v. U. S.*, 9 Ct. of Cl. 224.) If the pardon is conditioned upon taking an oath, he is not entitled to its benefit until the oath is taken (*Waring v. U. S.*, 7 Ct. of Cl. 501), and taking it before the granting of the pardon is not sufficient. (*Haym v. U. S.*, 7 Ct. of Cl. 443.) An alien domiciled within the United States is within the terms of the proclamation. (*Carlisle v. U. S.*, 16 Wall. 147; *Green v. U. S.*, 8 Ct. of Cl. 412.) The pardon granted by the president prior to Rev. Stats., sec. 3480, did not authorize payment of a claim to such person which originated prior to April 13, 1861. The court has no jurisdiction further than to find the facts. (*Hart v. United States*, 118 U. S. 62.) A condition in a pardon forbidding a claim to any property, or the proceeds of any property, sold under the confiscation laws, does not pre-

clude application to the court for the proceeds of a money bond secured by a confiscated mortgage. (*Osborn v. United States*, 91 U. S. 474.)

§ 675. Commissioners to take testimony.—The court of claims shall have power to appoint commissioners to take testimony to be used in the investigation of claims which come before it; to prescribe the fees which they shall receive for their services, and to issue commissions for the taking of such testimony, whether taken at the instance of the claimant or of the United States. (Rev. Stats., sec. 1075.)

Testimony admissible.—Testimony to be used in the court of claims must be taken by deposition (*Hughes v. U. S.*, 4 Ct. of Cl. 64); and *ex parte* affidavits cannot be used (*Wiggins v. U. S.*, 2 Ct. of Cl. 345); although transmitted with the petition to Congress. (*Clark v. U. S.*, 1 Ct. of Cl. 246; *McKee v. U. S.*, 1 Ct. of Cl. 336; *Wilde v. U. S.*, 7 Ct. of Cl. 415.)

Commission.—The application for the issue of a commission may be made at any time before the trial (*Atocha v. U. S.*, 6 Ct. of Cl. 95), and when made an order is entered by the clerk as of course (*Gibbons v. U. S.*, Dev. Ct. Cl. 138; *Mahan v. U. S.*, 6 Ct. of Cl. 331), and whether its issuance will lead to a postponement is to be determined by the facts of the case. (*Atocha v. U. S.*, 6 Ct. of Cl. 95.) The court of claims may refer to a special commissioner to state the accounts, marshal the assets, and adjust the losses between the different owners of intermingled cotton; and the judgment on such report and other evidence is valid. (*Intermingled Cotton Cases*, 92 U. S. 651.)

Depositions.—The deposition must state what the witness testifies to in the presence of all the parties, and additions made in the absence of an attorney of one of the

parties will be stricken out. (*Shrewsbury v. U. S.*, 9 Ct. of Cl. 333.) It should be read over to and be signed by the witness. (*Martin v. U. S.*, 3 Ct. of Cl. 384.) If the commissioner writes it out from his phonographic notes, and then attaches a loose sheet bearing the signature of the witness, it will be suppressed. (*Martin v. U. S.*, 3 Ct. of Cl. 384.) The sheets of a deposition should be so connected as that they cannot be tampered with, and each sheet should be signed by the commissioner and the witness. (*Martin v. U. S.*, 3 Ct. of Cl. 384.)

Examination of witness.—Objections which go merely to the form of a question should be taken at the examination (*Hughes v. U. S.*, 4 Ct. of Cl. 64); so of objections to parol evidence of the contents of a written instrument (*Hughes v. U. S.*, 4 Ct. of Cl. 64); but if the deposition is taken upon written interrogatories, and the witness states the contents of a written paper, the objection may be made after the return of the deposition (*Hughes v. U. S.*, 4 Ct. of Cl. 64); and objections which go merely to the manner of taking the testimony must be made before the hearing (*Hughes v. U. S.*, 4 Ct. of Cl. 64); but if they go to the competency or relevancy of the testimony, they may be taken at the hearing. (*Hughes v. U. S.*, 4 Ct. of Cl. 64.) The right to examine a witness is lost after one examination, and if a party requires a re-examination he must obtain leave of the court (*Atocha v. U. S.*, 6 Ct. of Cl. 95; *Mahan v. U. S.*, 6 Ct. of Cl. 331); and if he neglects to apply for leave, the admission of a second examination is within the discretion of the court (*Mahan v. U. S.*, 6 Ct. of Cl. 331); and when leave is granted he cannot be examined on other than the particular point specified. (*Sevier v. U. S.*, 7 Ct. of Cl. 388.)

§ 676. Power to call upon departments for information.—The said court shall have power to call upon any of the departments for any information or papers it may deem necessary, and shall have the use of all recorded and printed reports made by the committees

of each house of Congress, when deemed necessary in the prosecution of its business. But the head of any department may refuse and omit to comply with any call for information or papers when, in his opinion, such compliance would be injurious to the public interest. (Rev. Stats., sec. 1076.)

§ 677. When testimony not to be taken.

—When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not be the duty of the court to authorize the taking of any testimony therein. (Rev. Stats., sec. 1077.)

§ 678. Witnesses not excluded.—No witness shall be excluded in any suit in the court of claims on account of color. (Rev. Stats., sec. 1078.)

Note.—Rev. Stats., sec. 1079, was repealed March 3, 1887, sec. 8; 24 U. S. Stats. 506. This section was held to restore the common-law rule as it existed before the adoption of section 858. (U. S. v. Clark, 96 U. S. 57.) But it does not prevent the United States from using as a witness to defeat a claim one whose interest is adverse to the claimant. (Bradley v. U. S., 104 U. S. 442.)

Exclusion of witnesses.—The exclusion in this section reaches three classes of persons: the claimant, the person who has transferred the claim to the claimant, and any one interested in the event of the suit (U. S. v. Anderson, 9 Wall. 56), unless he testifies against the claim. (Wood v. U. S., 10 Ct. of Cl. 395.) So a claimant cannot testify in his own favor (McKee v. U. S., 1 Ct. of Cl. 336; Jones v. U. S., 1 Ct. of Cl. 383; Stoddard v. U. S., 4 Ct.

of Cl. 511; *Brooke v. U. S.*, 2 Ct. of Cl. 180); and his deposition taken before the adoption of this section cannot be used in the suit (*Hubbell v. U. S.*, 4 Ct. of Cl. 37; *Waters v. U. S.*, 4 Ct. of Cl. 389); but if a corporation is claimant, the trustees are competent witnesses (*Hebrew Congregation v. U. S.*, 6 Ct. of Cl. 241); and if the title or right of claimant to relief is established by other evidence, he is competent to prove the contents of a lost package, involved in his title and claim to relief. (*U. S. v. Clark*, 96 U. S. 37; but see *Christian v. U. S.*, 7 Cranch, 431.)

Assignor and assignee.—The United States may take the deposition of the assignee of a claim, or of a person interested in the event of the suit, but it cannot be used to support a claim against the United States. (*Macaulay v. U. S.*, 11 Ct. of Cl. 575.) A person who sold property to a claimant before its capture may testify in favor of the claimant. (*Grossmeyer v. U. S.*, 4 Ct. of Cl. 1; *Scharfer v. U. S.*, 4 Ct. of Cl. 529; *U. S. v. Anderson*, 9 Wall. 56.) If a counter-claim is filed by the United States for the breach of contract, a surety on the land cannot testify. (*Wood v. U. S.*, 10 Ct. of Cl. 395.)

§ 679. Examination of claimant.—The court may, at the instance of the attorney or solicitor appearing in behalf of the United States, make an order in any case pending therein, directing any claimant in such case to appear, upon reasonable notice, before any commissioner of the court, and be examined on oath touching any or all matters pertaining to said claim. Such examination shall be reduced to writing by said commissioner, and be returned to and filed in the court, and may, at the discretion of the attorney or solicitor of the United States appearing in the case, be read and used as evidence on the trial thereof.

And if any claimant, after such order is made, and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all matters within his knowledge material to the issue, the court may, in its discretion, order that the said cause shall not be brought forward for trial until he shall have fully complied with the order of the court in the premises. (Rev. Stats., sec. 1080.)

Note.—The claimant alone can be held responsible under this section. (*McCauley v. U. S.*, 11 Ct. of Cl. 575.) The provisions of this section shall apply to cases under the act of 24 U. S. Stats., *supra*.)

§ 680. Testimony taken where deponent resides.—The testimony in cases pending before the court of claims shall be taken in the county where the witness resides, when the same can be conveniently done. (Rev. Stats., sec. 1081.)

§ 681. Witnesses, how compelled to attend.—The court of claims may issue subpoenas to require the attendance of witnesses in order to be examined before any person commissioned to take testimony therein, and such subpoenas shall have the same force as if issued from a district court, and compliance therewith shall be compelled under such rules and orders as the court shall establish. (Rev. Stats., sec. 1082.)

§ 682. Cross-examination.—In taking testimony to be used in support of any claim

opportunity shall be given to the United States to file interrogatories, or by attorney to examine witnesses, under such regulations as said court shall prescribe; and like opportunity shall be afforded the claimant, in cases where testimony is taken on behalf of the United States, under like regulations. (Rev. Stats., sec. 1083.)

§ 683. **Witnesses, how sworn.**—The commissioner taking testimony to be used in the court of claims shall administer an oath or affirmation to the witnesses brought before him for examination. (Rev. Stats., sec. 1084.)

§ 684. **Fees of commissioner.**—When testimony is taken for the claimant, the fees of the commissioner before whom it is taken, and the cost of the commission and notice, shall be paid by such claimant; and when it is taken at the instance of the government, such fees, together with all postage incurred by the assistant attorney-general, shall be paid out of the contingent fund provided for the court of claims, or other appropriation made by Congress for that purpose. (Rev. Stats., sec. 1085.)

§ 685. **Claims forfeited for fraud.**—Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim, or of any part of any claim against the United States, shall *ipso facto* forfeit the same to the government; and it shall

be the duty of the court of claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the government, and that the claimant be forever barred from prosecuting the same. (Rev. Stats., sec. 1086.)

§ 686. New trial on motion of claimant.—When judgment is rendered against any claimant, the court may grant a new trial for any reason which, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial. (Rev. Stats., sec. 1087.)

Note.—If the decision is founded on a mistake of law claimant may file a motion for review. (Calhoun v. U. S., 14 Ct. of Cl. 193.) So if judgment is entered on matters not properly in evidence. (Alvord v. U. S., 9 Ct. of Cl. 133.) Where there has been no oversight or misapprehension a decision must be regarded as final, unless one of the judges desires a reargument. (Fendall v. U. S., 12 Ct. of Cl. 305.) A new trial cannot be granted merely because the amount involved is too small to allow an appeal (Deeson v. U. S., 6 Ct. of Cl. 227); nor on the ground of newly discovered evidence, if it could have been discovered by the use of due diligence (Garrison v. U. S., 2 Ct. of Cl. 382; Armstrong v. U. S., 6 Ct. of Cl. 226; Deeson v. U. S., 6 Ct. of Cl. 227; Bramhall v. U. S., 3 Ct. of Cl. 238); or unless it is made to appear that a different result would probably be reached. (Garrison v. U. S., 2 Ct. of Cl. 382; Bramhall v. U. S., 6 Ct. of Cl. 238.) The mere fact that the supreme court has made decisions since the judgment that might entitle claimant to a judgment is no ground for granting a new trial. (Bramhall v. U. S., 6 Ct. of Cl. 238.) Although claimant has no right to demand a new trial for a mistake in the find-

ings, yet the error may be corrected while the proceedings are under control of the court. (*Calhoun v. U. S.*, 14 Ct. of Cl. 193; *Neal v. U. S.*, 14 Ct. of Cl. 477.) An order dismissing a petition will not be stricken out if the petition shows that there is no jurisdiction (*Garcia v. U. S.*, 14 Ct. of Cl. 121), or that diligence to prosecute the claim has not been used (*Schuffelin v. U. S.*, 8 Ct. of Cl. 359; *Figh v. U. S.*, 3 Ct. of Cl. 97); and a judgment will not generally be set aside after an intervening term. (*Figh v. U. S.*, 3 Ct. of Cl. 97.) If the record is in possession of the court an allowance of an appeal may be stricken out and motion for new trial entertained. (*Ex parte Roberts*, 15 Wall. 384; but see *Stern v. U. S.*, 6 Ct. of Cl. 280; *Nutt v. U. S.*, 8 Ct. of Cl. 185.)

§ 687. New trial on motion of United States.—The court of claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law. (Rev. Stats., sec. 1088.)

Note.—Injustice contemplated by this section is not that which results from mere judicial error; it must be such as is discovered after rendition of judgment. (*Child v. U. S.*, 6 Ct. of Cl. 44.) If a motion for new trial is filed within two years after disposition of the claim, action may be taken thereon even after that time (*Bellocoq v. U. S.*, 13 Ct. of Cl. 195); and the objection of the lapse of more than two years after entry of judgment cannot be made

to a motion for a continuance. (U. S. v. Crusell, 12 Wall. 175.) The obligation to use diligence falls upon the officers of the government who are charged in law or in fact with its defense. (Silvey v. U. S., 7 Ct. of Cl. 305.) The final disposition of the suit is to date from the final termination on appeal, if appeal is taken, and if none is taken then from its final determination in the court of claims. (Ex parte Russell, 13 Wall. 664.) The mere filing of a motion for new trial is no ground for dismissing an appeal (U. S. v. Ayres, 9 Wall. 608); the case on appeal will be continued to await the decision on the motion. (U. S. v. Crusell, 12 Wall. 175.) It may be made even after filing a mandate affirming the judgment of the court of claims (Ex parte Russell, 13 Wall. 664; Ex parte United States, 16 Wall. 699); and if the new trial be granted, the appeal will be dismissed. (U. S. v. Ayres, 9 Wall. 608; U. S. v. Young, 94 U. S. 258.) A new trial will be granted if the new evidence is *prima facie* sufficient (Tait v. U. S., 5 Ct. of Cl. 638; Ayers v. U. S., 5 Ct. of Cl. 712; Douglass v. U. S., 11 Ct. of Cl. 655); but it will not be granted unless there was due diligence to discover the evidence (Child v. U. S., 6 Ct. of Cl. 44; Silvey v. U. S., 7 Ct. of Cl. 305); nor if the new evidence would not affect the result (Child v. U. S., 7 Ct. of Cl. 305); nor for an error of law where the party has ample remedy by appeal (Ealer v. U. S., 5 Ct. of Cl. 708); nor merely to contradict a witness upon an immaterial point. (Silvey v. U. S., 7 Ct. of Cl. 305.) If one motion has been denied a second motion based on the same grounds will not be considered. (Child v. U. S., 6 Ct. of Cl. 441.) The decision granting a new trial is not appealable. (Young v. U. S., 95 U. S. 641.) Where Congress directed the court of claims to rehear a claim which had been decided against on account of the informality of the papers, it intended that such court should wholly disregard such informality. (Cross v. United States, 14 Wall. 479.) Where the supreme court required the court of claims to proceed in the cause remanded, in conformity to law and justice, the court of claims may set aside the finding of facts made on the first trial, and try the case *de novo*. (Ex parte Medway, 90 U. S. 504.) Where the court of claims has revoked an order for the allowance of an appeal, it has power to hear, entertain,

and decide a motion for a new trial. (*Ex parte Roberts*, 15 Wall. 384.) Public officers cannot open and re-examine claims against the government which were rejected by their predecessors in office, in the absence of fraud, mistake in matters of fact arising from errors in calculations, or of newly discovered material evidence. (*Waddell v. United States*, 7 L. R. A. 861; 25 Ct. of Cl.) They have the right to pay into the treasury the disputed moneys, and then seek the courts to adjust and determine their claims against their superior and sovereign. Such payment is not an estoppel against the claimant. (*United States v. Mosby*, 133 U. S. 273.)

§ 688. Payment of judgments.—In all cases of final judgments by the court of claims, or, on appeal, by the supreme court, where the same are affirmed in favor of the claimant, the sum due thereby shall be paid out of any general appropriation made by law for the payment and satisfaction of private claims, on presentation to the secretary of the treasury of a copy of said judgment, certified by the clerk of the court of claims, and signed by the chief justice, or, in his absence, by the presiding judge of said court. (Rev. Stats., sec. 1089.)

Note.—The payment of a judgment of the court of claims satisfies the demand of a judgment creditor against the United States, and he is only required to enter satisfaction on receipt of the money. (*U. S. v. Frericha*, 124 U. S. 315.) Where two partners recovered a joint judgment against the United States, and it paid one half thereof to one partner, and applied the other half to a judgment in its favor against the other partner, the United States cannot be compelled to pay it over to them jointly. (*Howes v. U. S.*, 24 Ct. of Cl. 170.)

Private claims construed.—(*Sweeney v. U. S.*, 5 Ct. of Cl. 285.)

§ 689. Interest.—In cases where the judgment appealed from is in favor of the claimant, and the same is affirmed by the supreme court, interest thereon at the rate of five per centum shall be allowed from the date of its presentation to the secretary of the treasury for payment as aforesaid, but no interest shall be allowed subsequent to the affirmance, unless presented for payment to the secretary of the treasury as aforesaid. (Rev. Stats., sec. 1090.)

Provision is made in this section for the payment by government of interest on its debts. (*White v. Arthur*, 10 Fed. Rep. 83.) Interest on judgments is not to be paid unless the United States has appealed. (*White v. Arthur*, 10 Fed. Rep. 87; see *U. S. v. Jones*, 131 U. S. 1.)

§ 690. Interest on claims.—No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest. (Rev. Stats., sec. 1091.)

Interest.—Unless a contract stipulates for interest, interest cannot be allowed against the United States (*Tilson v. U. S.*, 100 U. S. 43; *Todd v. U. S.*, Dev. Ct. Cl. 175); but it may be allowed in the court of claims if allowed by Congress in the adjustment of like cases. (*U. S. v. McKee*, 91 U. S. 442.) Interest may be allowed on claims against proceeds of captured and abandoned property. (*Villalonga v. U. S.*, 23 Wall. 35.) No interest can be allowed except upon a contract expressly stipulating for interest. (*Harvey v. U. S.*, 113 U. S. 243; *Tilson v. U. S.*, 100 U. S. 43.)

§ 691. Payment of judgment a full discharge, etc.—The payment of the amount due

by any judgment of the court of claims and of any interest thereon allowed by law, as hereinbefore provided, shall be a full discharge to the United States of all claim and demand touching any of the matters involved in the controversy. (Rev. Stats., sec. 1092.)

§ 692. Final judgment a bar.—Any final judgment against the claimant on any claim prosecuted as provided in this chapter shall forever bar any further claim or demand against the United States arising out of the matters involved in the controversy. (Rev. Stats., sec. 1093.)

The judgments of the court of claims, where no appeal is taken to this court, are absolutely conclusive of the rights of the parties, and are not subject to revision by any one of the executive departments. (*United States v. O'Grady*, 22 Wall. 641.)

Final judgment.—The provisions of this section relate only to judgments on the merits (*Spicer v. U. S.*, 5 Ct. of Cl. 34); but though erroneous a judgment is a bar to another suit (*Osborn v. U. S.*, 19 Wall. 577); but it will not bar a subsequent suit for a different cause of action. (*Shrewsbury v. U. S.*, 18 Wall. 664; 9 Ct. of Cl. 263.) So a judgment on one petition will not bar another petition for rent due at another time. (*Cross v. U. S.*, 14 Wall. 479.) The judgment in an action by the holder of negotiable paper against indorsers is not a bar to a subsequent action against the maker not notified of the prior suit. (*Railroad Co. v. National Bank*, 102 U. S. 14; see *United States v. Irwin*, 127 U. S. 125.)

§ 693. Claims, etc., pending before Congress.—Whenever a claim or matter is pending before any committee of the Senate or

House of Representatives, or before either house of Congress, which involves the investigation and determination of facts, the committee or house may cause the same, with the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the court of claims of the United States, and the same shall there be proceeded in under such rules as the court may adopt. When the facts shall have been found, the court shall not enter judgment thereon, but shall report the same to the committee, or to the house by which the case was transmitted for its consideration. (22 U. S. Stats. 485, sec. 1.)

Transmission under the "Bowman Act."—Where a petitioner in Congress seeks the passage of a law which will enable him to acquire realty whereof the legal title is vested in the government, upon the payment of such sum as may be just and equitable, the matter may be transmitted to the court of claims, under the Bowman Act. (Taylor v. United States, 25 Ct. of Cl. 75.) The court has jurisdiction to find the facts in a claim for infringement of a patent referred to it by the committee on claims of the Senate. (Forehand v. United States, Ct. of Cl., 17 Wash. L. Rep. 37.) Where the primary purpose of a military order is not to supply the army, but to injure the enemy, the taking is an act of war, which gives the owners no right to relief for commissary supplies taken. (Conard v. United States, 25 Ct. of Cl. 433.) Under the Bowman Act it is the duty of the court of claims to settle the ultimate facts so that Congress may assume them as a basis for its legislative judgment and discretion, and it need not give the details. (Moore v. United States, 25 Ct. of Cl. 82.)

§ 694. Claims pending in executive departments.—When a claim or matter is pend-

ing in any of the executive departments which may involve controverted questions of fact or law, the head of such department may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the department by which it was transmitted, for its guidance and action. (22 U. S. Stats. 485, sec. 2.)

§ 695. Claims not within jurisdiction of court.—The jurisdiction of said court shall not extend to or include any claim against the United States growing out of the destruction or damage to property by the army or navy during the war for the suppression of the rebellion, or for the use and occupation of real estate by any part of the military or naval forces of the United States in the operations of said forces during the said war at the seat of war; nor shall the said court have jurisdiction of any claim against the United States which is now barred by virtue of the provisions of any law of the United States. (22 U. S. Stats. 485, sec. 3.)

§ 696. Claims for supplies, etc.—In any case of a claim for supplies or stores taken by or furnished to any part of military or naval

forces of the United States for their use during the late war for the suppression of the rebellion, the petition shall aver that the person who furnished such supplies or stores, or from whom such supplies or stores were taken, did not give any aid or comfort to said rebellion, but was throughout that war loyal to the government of the United States, and the fact of such loyalty shall be a jurisdictional fact; and unless the said court shall, on a preliminary inquiry, find that the person who furnished such supplies or stores, or from whom the same were taken as aforesaid, was loyal to the government of the United States throughout said war, the court shall not have jurisdiction of such cause, and the same shall, without further proceedings, be dismissed. (22 U. S. Stats. 485, sec. 4.)

§ 697. Defense, etc., for the United States.—The attorney-general, or his assistants under his direction, shall appear for the defense and protection of the interests of the United States in all cases which may be transmitted to the court of claims under this act, with the same power to interpose counter-claims, offsets, defenses for fraud practiced or attempted to be practiced by claimants, and other defenses, in like manner as he is now required to defend the United States in said court. (22 U. S. Stats. 485, sec. 5.)

§ 698. Parties in interest may testify, etc.—In the trial of such cases no person shall

be excluded as a witness because he or she is a party to or interested in the same. (22 U. S. Stats. 485, sec. 6.)

§ 699. Reports of court may be continued, etc., for action.—Reports of the court of claims to Congress under this act, if not finally acted upon during the session at which they are reported, shall be continued from session to session and from Congress to Congress until the same shall be finally acted upon. (Act approved March 3, 1883. 22 U. S. Stats. 485, sec. 7.)

§ 700. Spoiliations committed by the French.—Claimants may apply by petition to the court of claims for indemnity for detentions, seizures, condemnations, and confiscations, prior to the ratification of the convention between the United States and the French Republic, concluded on September 30, 1800, ratified July 31, 1801, within two years from the passage of this act; *provided*, that this act shall not extend to such claims as were embraced in that convention, nor to such claims growing out of the acts of France as were allowed and paid, in whole or in part, under the provisions of the treaty between the United States and Spain of February 22, 1819; nor to such claims as were allowed, in whole or in part, under the treaty between the United States and France of July 4, 1831. (See 23 U. S. Stats. 283, sec. 1.)

§ 701. Court to make needful rules.—The court is hereby authorized to make all

needful rules and regulations, not contravening the laws of the land or the provisions of this act, for executing the provisions hereof. (23 U. S. Stats. 283, sec. 2.)

§ 702. Court to determine validity, amount, ownership of claims.—The court shall examine and determine the validity and amount of all the claims included within the description above mentioned, together with their present ownership, and if by assignee, the date of the assignment, with the consideration paid therefor; *provided*, that in the course of their proceedings they shall receive all suitable testimony on oath or affirmation, and all other proper evidence, historic and documentary, concerning the same; and they shall decide upon the validity of said claims according to the rules of law, municipal and international, and the treaties of the United States applicable to the same, and shall report all such conclusions of fact and law as in their judgment may affect the liability of the United States therefor. (23 U. S. Stats. 283, sec. 3.)

§ 703. Attorney-general, notice to and defense by.—The court shall cause notice of all petitions presented under this act to be served on the attorney-general of the United States, who shall be authorized, by himself or his assistant, to examine witnesses, to cause testimony to be taken, to have access to all testimony taken under this act, and to be heard

by the court. He shall resist all claims presented under this act by all proper legal defenses. (23 U. S. Stats. 283, sec. 4.)

§ 704. Evidence and documents—How procured and filed.—It shall be the duty of the secretary of state to procure, as soon as possible after the passage of this act, through the American minister at Paris, or otherwise, all such evidence and documents relating to the claims above mentioned as can be obtained from abroad; which, together with the like evidence and documents on file in the department of state, or which may be filed in the department, may be used before the court by the claimants interested therein, or by the United States, but the same shall not be removed from the files of the court; and after the hearings are closed, the record of the proceedings of the court and the documents produced before them shall be deposited in the department of state. (23 U. S. Stats. 283, sec. 5.)

§ 705. Court to report to Congress.—On the first Monday of December in each year the court shall report to Congress, for final action, the facts found by it, and its conclusions in all cases which it has disposed of and not previously reported. Such finding and report of the court shall be taken to be merely advisory as to the law and facts found, and shall not conclude either the claimant or Congress; and all claims not finally presented to said court

within the period of two years limited by this act shall be forever barred; and nothing in this act shall be construed as committing the United States to the payment of any such claims. (Approved January 20, 1885. 23 U. S. Stats. 283, sec. 6.)

§ 706. Indian depredations.—In addition to the jurisdiction which now is, or may hereafter be, conferred upon the court of claims, said court shall have and possess jurisdiction and authority to inquire into and finally adjudicate, in the manner provided in this act, all claims of the following classes, namely: all claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States, without just cause or provocation on the part of the owner or agent in charge, and not returned or paid for. (26 U. S. Stats. 851, sec. 1, cl. 1.)

§ 707. Examined claims.—Such jurisdiction shall also extend to all cases which have been examined and allowed by the interior department, and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, and for other purposes (ap-

proved March 3, 1885; 23 U. S. Stats. 376), and under subsequent acts, subject, however, to the limitations hereinafter provided. (26 U. S. Stats. 851, sec. 1, cl. 2.)

§ 708. Offsets and counterclaims.—All just offsets and counterclaims to any claim of either of the preceding classes which may be before such court for determination. (26 U. S. Stats. 851, sec. 1, cl. 3.)

§ 709. Waiver of limitations.—All questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the secretary of the interior, or other officer or department of the government; *provided*, that no claim accruing prior to July 1, 1865, shall be considered by the court unless the claim shall be allowed, or has been or is pending, prior to the passage of this act, before the secretary of the interior or the Congress of the United States, or before any superintendent, agent, subagent, or commissioner, authorized under any act of Congress to inquire into such claims; but no case shall be considered pending unless evidence has been presented therein; *and provided further*, that all claims existing at the time of the taking effect of this act shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof, or shall be thereafter forever barred;

and provided further, that no suit or proceeding shall be allowed under this act for any depredation which shall be committed after the passage thereof. (26 U. S. Stats. 851, sec. 2.)

§ 710. Petition, etc.—All claims shall be presented to the court by petition setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, the persons, classes of persons, tribe or tribes, or band of Indians by, whom the alleged illegal acts were committed, as near as may be, the property lost or destroyed, and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved. The petition shall be verified by the affidavit of the claimant, his agent, administrator, or attorney, and shall be filed with the clerk of said court. It shall set forth the full name and residence of the claimant, the damages sought to be recovered, praying the court for a judgment upon the facts and the law. (26 U. S. Stats. 851, sec. 3.)

§ 711. Service on and defense by attorney-general.—The service of the petition shall be made upon the attorney-general of the United States, in such manner as may be provided by the rules or orders of said court. It shall be the duty of the attorney-general of the United States to appear and defend the interests of the government and of the Indians

in the suit, and within sixty days after the service of the petition upon him, unless the time shall be extended by order of the court made in the case, to file a plea, answer, or demurrer, on the part of the government and the Indians; and to file a notice of any counterclaim, set-off, claim of damages, demand, or defense whatsoever of the government or of the Indians in the premises; *provided*, that should the attorney-general neglect or refuse to file the plea, answer, demurrer, or defense as required, the claimant may proceed with the case under such rules as the court may adopt in the premises; but the claimant shall not have judgment for his claim, or for any part thereof, unless he shall establish the same by proofs satisfactory to the court; *provided*, that any Indian or Indians interested in the proceedings may appear and defend, by an attorney employed by such Indian or Indians with the approval of the commissioner of Indian affairs, if he or they shall choose so to do. (26 U. S. Stats. 851, sec. 4, cl. 1.)

§ 712. Evidence—Priority of claims reopening cases.—In considering the merits of claims presented to the court, any testimony, affidavits, reports of special agents or other officers, and such other papers as are now on file in the departments or in the courts, relating to any such claims, shall be considered by the court as competent evidence, and such weight given thereto as in its judgment is right and

proper; *provided*, that all unpaid claims which have heretofore been examined, approved, and allowed by the secretary of the interior, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1886, and for other purposes, approved March 3, 1885, and subsequent Indian appropriation acts, shall have priority of consideration by such court, and judgments for the amounts therein found due shall be rendered, unless either the claimant or the United States shall elect to reopen the case and try the same before the court, in which event the testimony in the case given by the witnesses, and the documentary evidence, including reports of department agents therein, may be read as depositions and proofs; *provided*, that the party electing to reopen the case shall assume the burden of proof. (26 U. S. Stats. 851, sec. 4, cl. 2.)

§ 713. Rules for taking testimony, etc.

—The said court shall make rules and regulations for taking testimony in the causes herein provided for, by deposition or otherwise, and such testimony shall be taken in the county where the witness resides, when the same can be conveniently done, and no person shall be excluded as a witness because he is party to or interested in said suit, and any claimant or

party in interest may be examined as a witness on the part of the government; that the court shall determine in each case the value of the property taken or destroyed at the time and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such can be identified. (26 U. S. Stats. 851, sec. 5.)

§ 714. Judgment, how paid.—The amount of any judgment so rendered against any tribe of Indians shall be charged against the tribe by which, or by members of which, the court shall find that the depredation was committed, and shall be deducted and paid in the following manner: First, from annuities due said tribe from the United States; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their current and necessary support, subsistence, and education; and fourth, if no such annuity, fund, or appropriation is due or available, then the amount of the judgment shall be paid from the treasury of the United States; *provided*, that any amount so paid from the

treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund, or appropriation heretofore designated which may hereafter become due from the United States to such tribe. (26 U. S. Stats. 851, sec. 6.)

§ 715. Judgments final—Appeal.—All judgments of said court shall be a final determination of the causes decided, and of the rights and obligations of the parties thereto, and shall not thereafter be questioned unless a new trial or rehearing shall be granted by said court, or the judgment reversed or modified upon appeal as hereafter provided. (26 U. S. Stats. 851, sec. 7.)

§ 716. List of judgments to be sent to Congress.—Immediately after the beginning of each session of Congress, the attorney-general of the United States shall transmit to the Congress of the United States a list of all final judgments rendered in pursuance of this act, in favor of claimants and against the United States, and not paid as hereinbefore provided, which shall thereupon be appropriated for in the proper appropriation bill. (26 U. S. Stats. 851, sec. 8.)

§ 717. Assignment of claims.—All sales, transfers, or assignments of any such claims heretofore or hereafter made, except such as have occurred in the due administration of de-

cedents' estates, and all contracts heretofore made for fees and allowances to claimants' attorneys, are hereby declared void, and all warrants issued by the secretary of the treasury, in payment of such judgments, shall be made payable and delivered only to the claimant or his lawful heirs, executors, or administrators, or transferee under administrative proceedings, except so much thereof as shall be allowed the claimant's attorneys by the court for prosecuting said claim, which may be paid direct to such attorneys, and the allowances to the claimant's attorneys shall be regulated and fixed by the court at the time of rendering judgment in each case and entered of record as part of the findings thereof; but in no case shall the allowance exceed fifteen per cent of the judgment recovered, except in case of claims of less amount than five hundred dollars, or where unusual services have been rendered or expenses incurred by the claimant's attorney, in which case not to exceed twenty per cent of such judgment shall be allowed by the court. (26 U. S. Stats. 851, sec. 9.)

§ 718. Appeal.—The claimant, or the United States, or the tribe of Indians, or other party thereto interested in any proceedings brought under the provisions of this act, shall have the same rights of appeal as are or may be reserved in the statutes of the United States in other cases, and upon the conditions and limitations therein contained. The mode of pro-

cedure in claiming and perfecting an appeal shall conform, in all respects, as near as may be, to the statutes and rules of court governing appeals in other cases. (26 U. S. Stats. 851, sec. 10.)

§ 719. All papers, etc., to be furnished the court.—All papers, reports, evidence, records, and proceedings now on file or of record in any of the departments, or the office of the secretary of the Senate, or the office of the clerk of the House of Representatives, or certified copies of the same, relating to any claims authorized to be prosecuted under this act, shall be furnished to the court upon its order, or at the request of the attorney-general. (26 U. S. Stats. 851, sec. 11.)

§ 720. Assistant attorney-general.—To facilitate the speedy disposition of the cases herein provided for, in said court of claims, there shall be appointed, in the manner prescribed by law for the appointment of assistant attorney-generals, one additional assistant attorney-general of the United States, who shall receive a salary of twenty-five hundred dollars per annum. (26 U. S. Stats. 851, sec. 12.)

§ 721. Investigation under present laws.—The investigation and examinations, under the provisions of the acts of Congress heretofore in force, of Indian depredation claims, shall cease upon the taking effect of

this act, and the unexpended balance of the appropriation therefor shall be covered into the treasury, except so much thereof as may be necessary for disposing of the unfinished business pertaining to the claims now under investigation in the interior department, pending the transfer of said claims and business to the court or courts herein provided for, and for making such transfers and a record of the same, and for the proper care and custody of the papers and records relating thereto. (Approved March 3, 1891; 26 U. S. Stats. 851, sec. 13.)

§ 722. Court to determine claim of Pottawatomies.—Full jurisdiction is conferred on the court of claims, subject to an appeal to the supreme court, to hear and determine the question whether or not a citizen band of Pottawatomie Indians purchased and paid the United States for the tract of country, under an agreement entered into between the United States and said band of Indians, pursuant to the act of March 3, 1891. (See 26 U. S. Stats. 1021, sec. 12.)

§ 723. Private claim referred.—A claim of certain members of the Pottawatomie nation of Indians referred to the court of claims for adjudication. (Appropriation Act of March 3, 1885; 23 U. S. Stats. 372.)

CHAPTER XXV.

COURT OF PRIVATE LAND CLAIMS.

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- § 726. Appointment of United States attorney.
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- § 749. Private rights of persons between each other not concluded.
- § 750. Operation of decree as against United States.
- § 751. No confirmation, etc., for more than eleven square leagues to criminal grantee, etc.
- § 752. Conditional grants, etc., barred if conditions unperformed.
- § 753. Lands decreed to claimant, but granted, etc., by United States to another.
- § 754. Ascertainment and report on Spanish and Mexican claims.

§ 755. Continuous adverse possession for twenty years recognized, etc.

§ 756. Review by commissioner of general land-office—Patents.

§ 757. Where township surveys already made.

§ 758. Filing of claims under adverse possession—Time limit.

§ 759. Cessation, etc., of functions, etc., of court—Date, etc.

§ 724. Court of private land claims established.—There shall be, and hereby is, established a court to be called the court of private land claims, to consist of a chief justice and four associate justices, who shall be, when appointed, citizens and residents of some of the states of the United States, to be appointed by the President, by and with the advice and consent of the Senate, to hold their offices for the term expiring on the thirty-first day of December, Anno Domini eighteen hundred and ninety-five; any three of whom shall constitute a quorum. Said court shall have and exercise jurisdiction in the hearing and decision of private land claims according to the provisions of this act. The chief justice and the associate justices shall each receive a compensation of five thousand dollars per year, payable monthly, and their necessary traveling and personal expenses while engaged in the performance of their duties. The said court shall appoint a clerk, at a salary of two thousand dollars a year, who shall attend all the sessions of the court, and a deputy clerk, where regular terms of the court are held, at a salary of eight hundred dollars a year. The court shall appoint a stenographer, at a salary of fifteen hundred dollars a year, who shall attend

all the sessions of the court and perform the duties required of him by the court. (26 U. S. Stats. 854, sec. 1, cl. 1.)

§ 725. **Powers, etc.**— The said court shall have power to adopt all necessary rules and regulations for the transaction of its business and to carry out the provisions of this act; to issue any process necessary to the transaction of the business of said court, and to issue commissions to take depositions as provided in chapter seventeen of title thirteen of the Revised Statutes of the United States. Each of said justices shall have power to administer oaths and affirmations. It shall be the duty of the United States marshal for any district or territory in which the court is held to serve any process of the said court placed in his hands for that purpose, and to attend the court in person or by deputy when so directed by the court. The court shall hold such sessions in the states and territories mentioned in this act as shall be needful for the purposes thereof, and shall give notice of the times and places of the holding of such sessions, by publication in both the English and Spanish languages, in one newspaper published at the capitol of such state or territory, once a week for two successive weeks, the last of which publications shall be not less than thirty days next preceding the times of the holding of such sessions, but such sessions may be adjourned

from time to time without such publication. (26 U. S. Stats. 854, sec. 1, cl. 2.)

§ 726. United States attorney, appointment.—There shall also be appointed by the president, by and with the advice and consent of the Senate, a competent attorney, learned in the law, who shall when appointed be a resident and citizen of some state of the United States, to represent the United States in said court. Such attorney shall receive a compensation of three thousand five hundred dollars per year, payable monthly, and his necessary traveling and personal expenses while engaged in the discharge of his duties. And there shall be appointed by the said court a person who shall be when appointed a citizen and resident of some state of the United States, skilled in the Spanish and English languages, to act as interpreter and translator in said court, to attend all the sessions thereof, and to perform such other service as may be required of him by the court. Such person shall be entitled to a compensation of one thousand five hundred dollars per year, payable monthly, and his necessary traveling and personal expenses while engaged in the discharge of his duties. (26 U. S. Stats. 855, sec. 2.)

§ 727. Notice of organization of court.—Immediately upon the organization of said court the clerk shall cause notices thereof, and of the time and place of the first session thereof,

to be published for a period of ninety days in one newspaper at the city of Washington and in one published at the capital of the state of Colorado and of the territories of Arizona and New Mexico. Such notices shall be published in both the Spanish and English languages, and shall contain the substance of this act. (26 U. S. Stats. 855, sec. 3.)

§ 728. Production of records, etc.—It shall be the duty of the commissioner of the general land-office of the United States, the surveyors-general of such territories and states, or the keeper of any public records who may have possession of any records and papers relating to any land grants or claims for land within said states and territories in relation to which any petition shall be brought under this act, on the application of any person interested or by the attorney of the United States, to safely transmit such records and papers to said court or to attend in person or by deputy any session thereof, when required by said court, and produce such records and papers. (26 U. S. Stats. 856, sec. 4.)

§ 729. Competence, etc., of evidence as to claims.—The testimony which has been heretofore lawfully and regularly received by the surveyor-general of the proper territory or state, or by the commissioner of the general land-office, upon any claims presented to them, respectively, shall be admitted in evidence in

all trials under this act when the person testifying is dead, so far as the subject-matter thereof is competent evidence, and the court shall give it such weight as, in its judgment, under all the circumstances, it ought to have. (U. S. Stats. 856, sec. 5.)

§ 730. Claimants under unconfirmed grants.—It shall and may be lawful for any person or persons, or corporation, or their legal representatives, claiming lands within the limits of the territory derived by the United States from the republic of Mexico, and now embraced within the territories of New Mexico, Arizona, or Utah, or within the states of Nevada, Colorado, or Wyoming, by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States which at the date of the passage of this act have not been confirmed by act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect, in every such case to present a petition, in writing, to the said court in the state or territory where said land is situated and where the said court holds its sessions, but cases arising in the states and territories in which the court does not hold regular sessions may be instituted at such place as may be designated by the rules of the court. (26 U. S. Stats. 856, sec. 6, cl. 1.)

§ 731. **Form of petition.**—The petition shall set forth fully the nature of their claims to the lands, and particularly state the date and form of the grant, concession, warrant, or order of survey under which they claim, by whom made, the name or names of any person or persons in possession of or claiming the same, or any part thereof, otherwise than by the lease or permission of the petitioner; and also the quantity of land claimed and the boundaries thereof, where situate, with a map showing the same, as near as may be, and whether the said claim has heretofore been confirmed, considered, or acted upon by Congress or the authorities of the United States, or been heretofore submitted to any authorities constituted by law for the adjustment of land titles within the limits of the said territory so acquired, and by them reported on unfavorably or recommended for confirmation, or authorized to be surveyed or not; and pray in such petition that the validity of such title or claim may be inquired into and decided. (26 U. S. Stats. 856, sec. 6, cl. 2.)

§ 732. **Jurisdiction, etc.—Procedure.**—And the said court is hereby authorized and required to take and exercise jurisdiction of all cases or claims presented by petition in conformity with the provisions of this act, and to hear and determine the same, as in this act provided, on the petition and proofs in case no answer or answers be filed after due notice, or

on the petition and the answer or answers of any person or persons interested in preventing any claim from being established, and the answer of the attorney for the United States where he may have filed an answer, and such testimony and proofs as may be taken; and a copy of such petition, with a citation to any adverse possessor or claimant, shall, immediately after the filing of the same, be served on such possessor or claimant in the ordinary legal manner of serving such process in the proper state or territory, and in like manner on the attorney for the United States; and it shall be the duty of the attorney for the United States, as also any adverse possessor or claimant, after service of petition and citation as hereinbefore provided, within thirty days, unless further time shall, for good cause shown, be granted by the court, or a judge thereof, to enter an appearance, and plead, answer, or demur to said petition; and in default of such plea, answer, or demurrer being made within said thirty days, or within the further time which may have been granted as aforesaid, the court shall proceed to hear the cause on the petition and proofs, and render a final decree according to the provisions of this act, and in no case shall a decree be entered otherwise than upon full legal proof and hearing; and in every case the court shall require the petition to be sustained by satisfactory proofs, whether an answer or plea shall have been filed or not. (26 U. S. Stats. 856, sec. 6, cl. 3.)

§ 733. **Proceedings after petition—Pow-
ers, etc.**—All proceedings subsequent to the fil-
ing of said petition shall be conducted as near as
may be according to the practice of the courts of
equity of the United States, except that the an-
swer of the attorney of the United States shall
not be required to be verified by his oath, and ex-
cept that, as far as practicable, testimony shall
be taken in court or before one of the justices
thereof. The said court shall have full power
and authority to hear and determine all ques-
tions arising in cases before it relative to the
title to the land, the subject of such case, the
extent, location, and boundaries thereof, and
other matters connected therewith fit and proper
to be heard and determined, and by a final de-
cree to settle and determine the question of the
validity of the title and the boundaries of the
grant or claim presented for adjudication, ac-
cording to the law of nations, the stipulations of
the treaty concluded between the United States
and the republic of Mexico at the city of Guada-
lupe-Hidalgo, on the second day of February, in
the year of our Lord eighteen hundred and forty-
eight, or the treaty concluded between the same
powers at the city of Mexico, on the thirtieth
day of December, in the year of our Lord eigh-
teen hundred and fifty-three, and the laws and
ordinances of the government from which it is
alleged to have been derived, and all other
questions properly arising between the claim-
ants or other parties in the case and the United
States, which decree shall in all cases refer to

the treaty, law, or ordinance under which such claim is confirmed or rejected; and in confirming any such claim, in whole or in part, the court shall in its decree specify plainly the location, boundaries, and area of the land the claim to which is so confirmed. (26 U. S. Stats. 857, sec. 7.)

§ 734. Application by other claimants.

—Any person or corporation claiming lands in any of the states or territories mentioned in this act under a title derived from the Spanish or Mexican government, that was complete and perfect at the date when the United States acquired sovereignty therein, shall have the right (but shall not be bound) to apply to said court in the manner in this act provided for other cases for a confirmation of such title; and on such application said court shall proceed to hear, try, and determine the validity of the same and the right of the claimant thereto, its extent, location, and boundaries, in the same manner and with the same powers as in other cases in this act mentioned. (26 U. S. Stats. 857, sec. 8, cl. 1.)

§ 735. Confirmation of perfect title, limited.—If in any such case, a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by

the United States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. And no confirmation of claims or titles in this section mentioned shall have any effect other or further than as a release of all claim of title by the United States; and no private right of any person as between himself and other claimants or persons, in respect of any such lands, shall be in any manner affected thereby. (26 U. S. Stats. 857, sec. 8, cl. 2.)

§ 736. Proceedings by the United States against certain claimants, etc.—It shall be lawful for and the duty of the head of the department of justice, whenever in his opinion the public interest or the rights of any claimant shall require it, to cause the attorney of the United States in said court to file in said court a petition against the holder or possessor of any claim or land in any of the states or territories mentioned in this act who shall not have voluntarily come in under the provisions of this act, stating in substance that the title of such holder or possessor is open to question, or stating in substance that the boundaries of any such land, the claimant or possessor to or of which has not brought the matter into court, are open to question, and praying that the title to any such land, or the boundaries thereof, if the title be admitted, be settled and adjudi-

cated; and thereupon the court shall, on such notice to such claimant or possessor as it shall deem reasonable, proceed to hear, try, and determine the questions stated in such petition or arising in the matter, and determine the matter according to law, justice, and the provisions of this act, but subject to all lawful rights adverse to such claimant or possessor, as between such claimant and possessor and any other claimant or possessor, and subject in this respect to all the provisions of this section applicable thereto. (26 U. S. Stats. 858, sec. 8, cl. 3.)

§ 737. Appeal — Retrial by supreme court.—The party against whom the court shall in any case decide—the United States, in case of the confirmation of a claim in whole or in part, and the claimant, in case of the rejection of a claim in whole or in part—shall have the right of appeal to the supreme court of the United States, such appeal to be taken within six months from date of such decision, and in all respects to be taken in the same manner and upon the same conditions, except in respect of the amount in controversy, as is now provided by law for the taking of appeals from decisions of the circuit courts of the United States. On any such appeal the supreme court shall retry the cause, as well the issues of fact as of law, and may cause testimony to be taken in addition to that given in the court below, and may amend the record of the pro-

ceedings below as truth and justice may require; and on such retrial and hearing every question shall be open, and the decision of the supreme court thereon shall be final and conclusive. Should no appeal be taken as aforesaid, the decree of the court below shall be final and conclusive. (26 U. S. Stats. 858, sec. 9, cl. 1.)

§ 738. Notice to attorney-general of confirmation—Appeal.—Upon the rendition of any judgment of the court confirming any claim, it shall be the duty of the attorney of the United States to notify the attorney-general, in writing, of such judgment, giving him a clear statement of the case and the points decided by the court, which statement shall be verified by the certificate of the presiding judge of said court; and in any case in which such statement shall not be received by the attorney-general within sixty days next after the rendition of such judgment, the right of appeal on the part of the United States shall continue to exist until six months next after the receipt of such statement. And if the attorney-general shall so direct, it shall be the duty of the clerk of the court to transmit the record of any cause in which final judgment has been rendered to the attorney-general for his examination. In all cases it shall be the duty of the attorney-general to instruct the attorney for the United States what further course to pursue, and whether or not an appeal shall be taken. (26 U. S. Stats. 858, sec. 9, cl. 2.)

§ 739. Certificate of final decree of confirmation.—Whenever any decision of confirmation shall become final, the clerk of the court in which the final decision shall be had shall certify that fact to the commissioner of the general land-office, with a copy of the decree of confirmation, which shall plainly state the location, boundaries, and area of the tract confirmed. The said commissioner shall thereupon, without delay, cause the tract so confirmed to be surveyed at the cost of the United States. When any such survey shall have been made and returned to the surveyor-general of the respective territory or state, and the plat thereof completed, the surveyor-general shall give notice that same has been done, by publication once a week, for four consecutive weeks, in two newspapers, one published at the capital of the territory or state, and the other (if any such there be) published near the land so surveyed, such notices to be published in both the Spanish and English languages; and the surveyor-general shall retain such survey and plat in his office for public inspection for the full period of ninety days from the date of the first publication of notice in the newspaper published at the capital of the territory or state. (26 U. S. Stats. 858, sec. 10, cl. 1.)

§ 740. Approval and forwarding to general land-office.—If, at the expiration of such period, no objection to such survey shall have been filed with him, he shall approve the

same and forward it to the commissioner of the general land-office. If, within the said period of ninety days, objections are made to such survey, either by any party claiming an interest in the confirmation or by any party claiming an interest in the tract embraced in the survey or any part thereof, such objection shall be reduced to writing, stating distinctly the interest of the objector and the grounds of his objection, and signed by him or his attorney, and filed with the surveyor-general, with such affidavits or other proofs as he may produce in support of his objection. At the expiration of the said ninety days the surveyor-general shall forward such survey, with the objections and proofs filed in support of or in opposition to such objections, and his report thereon, to the commissioner of the general land-office. (26 U. S. Stats. 859, sec. 10, cl. 2.)

§ 741. Transmission of survey, etc., to court of final decision—Approval.—Immediately upon receipt of any such survey, with or without objections thereto, the said commissioner shall transmit the same, with all accompanying papers, to the court in which the final decision was made, for its examination of the survey and of any objections and proofs that may have been filed, or shall be furnished; and the said court shall thereupon determine if the said survey is in substantial accordance with the decree of confirmation. If found to be correct, the court shall direct its clerk to indorse

upon the face of the plat its approval. If found to be incorrect, the court shall return the same for correction in such particulars as it shall direct. When any survey is finally approved by the court, it shall be returned to the commissioner of the general land-office, who shall, as soon as may be, cause a patent to be issued thereon to the conferee. One half of the necessary expenses of making the survey and plat provided for in this section, and in respect of which a patent shall be ordered to be issued, shall be paid by the claimant or patentee, and shall be a lien on said land, which may be enforced by the sale of so much thereof as may be necessary for that purpose, after a default of payment thereof for six months next after the approval of such survey and plat; and no patent shall issue until such payment. (26 U. S. Stats. 859, sec. 10, cl. 3.)

§ 742. Scope of act as to claims.—The provisions of this act shall extend to any city lot, town lot, village lot, farm lot, or pasture lot claimed directly or mediately under any grant which may be entitled to confirmation by the United States, for the establishment of a city, town, or village, by the Spanish or Mexican government, or the lawful authorities thereof; but the claim for said city, town, or village shall be presented by the corporate authorities of the said city, town, or village; or where the land upon which said city, town, or village is situated was originally granted to an

individual, the claim shall be presented by or in the name of said individual or his legal representatives. (26 U. S. Stats. 859, sec. 11.)

§ 743. Neglect to file petition in two years a bar.—All claims mentioned in section six of this act which are by the provisions of this act authorized to be prosecuted shall, at the end of two years from the taking effect of this act, if no petition in respect to the same shall have then been filed as hereinbefore provided, be deemed and taken, in all courts and elsewhere, to be abandoned and shall be forever barred; *provided*, that in any case where it shall come to the knowledge of the court that minors, married women, or persons *non compos mentis* are interested in any land claim or matter brought before the court, it shall be its duty to appoint a guardian *ad litem* for such persons under disability and require a petition to be filed in their behalf, as in other cases, and if necessary to appoint counsel for the protection of their rights. The judges, respectively, of said court are hereby authorized in all cases arising under this act to grant in vacation all orders for taking testimony, and otherwise to hear and dispose of interlocutory motions not affecting the substantial merits of a case. And said court shall have and possess all the powers of a circuit court of the United States in preserving order, compelling the production of books, papers, and documents, the attendance of wit-

nesses, and in punishing contempts. (26 U. S. Stats. 859, sec. 12.)

§ 744. Limitations of right to proceed.

—All the foregoing proceedings and rights shall be conducted and decided subject to the following provisions as well as to the other provisions of this act, namely: —

§ 745. No claim allowed unless title lawfully and regularly derived, etc.—No

claim shall be allowed that shall not appear to be upon a title lawfully and regularly derived from the government of Spain or Mexico, or from any of the states of the republic of Mexico having lawful authority to make grants of land, and one that if not then complete and perfect at the date of the acquisition of the territory by the United States, the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States, and that the United States are bound, upon the principles of public law, or by the provisions of the treaty of cession, to respect and permit to become complete and perfect if the same was not at said date already complete and perfect. (26 U. S. Stats. 860, sec. 13, cl. 1.)

§ 746. No claim allowed interfering with Indian title, etc.—No claim shall be allowed that shall interfere with or overthrow any just and unextinguished Indian title or

right to any land or place. (26 U. S. Stats. 860, sec. 13, cl. 2.)

§ 747. No confirmation to mines or minerals.—No allowance or confirmation of any claim shall confer any right or title to any gold, silver, or quicksilver mines or minerals of the same, unless the grant claimed effected the donation or sale of such mines or minerals to the grantee, or unless such grantee has become otherwise entitled thereto in law or in equity; but all such mines and minerals shall remain the property of the United States, with the right of working the same, which fact shall be stated in all patents issued under this act. But no such mine shall be worked on any property confirmed under this act without the consent of the owner of such property until specially authorized thereto by an act of Congress hereafter passed. (26 U. S. Stats. 860, sec. 13, cl. 3.)

§ 748. Right hitherto decided by Congress, etc.—No claim shall be allowed for any land the right to which has hitherto been lawfully acted upon and decided by Congress, or under its authority. (26 U. S. Stats. 860, sec. 13, cl. 4.)

§ 749. Private rights of persons between each other.—No proceeding, decree, or act under this act shall conclude or affect the private rights of persons as between each other,

all of which rights shall be reserved and saved to the same effect as if this act had not been passed; but the proceedings, decrees, and acts herein provided for shall be conclusive of all rights as between the United States and all persons claiming any interest or right in such lands. (26 U. S. Stats. 860, sec. 13, cl. 5.)

§ 750. Operation of decree as against United States.—No confirmation of or decree concerning any claim under this act shall in any manner operate or have effect against the United States otherwise than as a release by the United States of its right and title to the land confirmed, nor shall it operate to make the United States in any manner liable in respect of any such grants, claims, or lands, or their disposition, otherwise than as is in this act provided. (26 U. S. Stats. 860, sec. 13, cl. 6.)

§ 751. No confirmation, etc., for more than eleven square leagues.—No confirmation in respect of any claims or lands mentioned in section six of this act, or in respect of any claim or title that was not complete and perfect at the time of the transfer of sovereignty of the United States as referred to in this act, shall in any case be made or patent issued for a greater quantity than eleven square leagues of land to or in the right of any one original grantee or claimant, or in the right of any one original grant to two or more persons jointly, nor for a greater quantity than was authorized

by the respective laws of Spain or Mexico applicable to the claim. (26 U. S. Stats. 861, sec. 13, cl. 7.)

§ 752. Conditional grants, etc., barred if conditions unperformed.—No concession, grant, or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and in the manner stated in any such concession, grant, or other authority to acquire land. (26 U. S. Stats. 861, sec. 13, cl. 8.)

§ 753. Lands decreed to claimant, but granted, etc., by United States to another.—If in any case it shall appear that the lands, or any part thereof, decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the lands so sold or granted, such court shall render judgment in favor of such claimant against the United States for the reasonable value of said lands so sold or granted, exclusive of betterments, not exceeding one dollar and twenty-five cents per acre for such lands;

and such judgment, when found, shall be a charge on the treasury of the United States. Either party deeming himself aggrieved by such judgment may appeal in the same manner as provided herein in cases of confirmation of a Spanish or Mexican grant. For the purpose of ascertaining the value and amount of such lands, surveys may be ordered by the court, and proof taken before the court, or by a commissioner appointed for that purpose by the court. (26 U. S. Stats. 861, sec. 14.)

§ 754. Ascertainment and report on Spanish and Mexican claims.—Section eight of the act of Congress, approved July 22, 1854, entitled "An act to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes," and all acts amendatory or in extension thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act, are hereby repealed. (26 U. S. Stats. 861, sec. 15.)

§ 755. Adverse possession for twenty years.—In township surveys hereafter to be made in the territories of New Mexico, Arizona, and Utah, and in the states of Colorado, Nevada, and Wyoming, if it shall be made to appear to the satisfaction of the deputy surveyor making such survey that any person has, through himself, his ancestors, grantors, or their lawful successors in title or possession,

been in the continuous adverse actual *bona fide* possession, residing thereon as his home, of any tract of land or in connection therewith of other lands, altogether not exceeding one hundred and sixty acres in such township for twenty years next preceding the time of making such survey, the deputy surveyor shall recognize and establish the lines of such possession, and make the subdivision of the adjoining lands in accordance therewith. Such possession shall be accurately defined in the field-notes of the survey and delineated on the township plat, with the boundaries and area of the tract as a separate legal subdivision. The deputy surveyor shall return with his survey the name or names of all persons so found to be in possession, with a proper description of the tract in the possession of each as shown by the survey, and the proofs furnished to him of such possession. (26 U. S. Stats. 861, sec. 16, cl. 1.)

§ 756. Review by commissioner of general land-office—Issue of patents.—

Upon receipt of such survey and proofs, the commissioner of the general land-office shall cause careful investigation to be made in such manner as he shall deem necessary for the ascertainment of the truth in respect of such claim and occupation, and if satisfied upon such investigation that the claimant comes within the provisions of this section, he shall cause patents to be issued to the parties so found to be in possession for the tracts respec-

tively claimed by them; *provided, however*, that no person shall be entitled to confirmation of, or to patent for, more than one hundred and sixty acres in his own right by virtue of this section; *and provided further*, that this section shall not apply to any city lot, town lot, village lot, farm lot, or pasture lot held under a grant from any corporation or town the claim to which may fall within the provisions of section eleven of this act. (26 U. S. Stats. 861, sec. 16, cl. 2.)

§ 757. Where township surveys already made.—In the case of townships heretofore surveyed in the territories of New Mexico, Arizona, and Utah, and the states of Colorado, Nevada, and Wyoming, all persons who, or whose ancestors, grantors, or their lawful successors in title or possession, became citizens of the United States by reason of the treaty of Guadalupe-Hidalgo, and who have been in the actual continuous adverse possession and residence thereon of tracts of not to exceed one hundred and sixty acres each, for twenty years next preceding such survey, shall be entitled, upon making proof of such facts to the satisfaction of the register and receiver of the proper land district, and of the commissioner of the general land-office upon such investigation as is provided for in section sixteen of this act, to enter without payment of purchase-money, fees, or commissions, such legal subdivisions, not exceeding one hundred and sixty acres, as shall include their said possessions; *provided*,

however, that no person shall be entitled to enter more than one such tract, in his own right, under the provisions of this section. (26 U. S. Stats. 862, sec. 17.)

§ 758. Filing of claims under adverse possession.—All claims arising under either of the two next preceding sections of this act shall be filed with the surveyor-general of the proper state or territory within two years next after the passage of this act, and no claim not so filed shall be valid. And the class of cases provided for in said two next preceding sections shall not be considered or adjudicated by the court created by this act, and no tract of such land shall be subject to entry under the land laws of the United States. (26 U. S. Stats. 862, sec. 18.)

§ 759. Cessation, etc., of functions, etc., of court.—The powers and functions of the court established by this act shall cease and determine on the thirty-first day of December, eighteen hundred and ninety-five, and all papers, files, and records in the possession of said court belonging to any other public office of the United States shall be returned to such office, and all other papers, files, and records in the possession of or appertaining to said court shall be returned to and filed in the department of the interior. (Approved March 3, 1891; 26 U. S. Stats. 862, sec. 19.)

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RULES OF COURTS.

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RULES

OF THE

SUPREME COURT OF THE UNITED STATES.

RULE 1. CLERK.

1. Office, where.—The clerk of this court shall reside and keep the office at the seat of the national government, and he shall not practice either as attorney or counselor in this court or in any other court while he shall continue to be clerk of this court.

Original Rule 1, promulgated February 3, 1790; 1 Cranch, xvi; 1 Wheat. xiii; 1 Peters, v. Revised and corrected December Term, 1858, 21 How. v.

Clerk shall not act as attorney or counselor. Revised Statutes, § 748, *ante*.

2. Duties.—The clerk shall not permit any original record or paper to be taken from the court-room, or from the office without an order from the court, except as provided by Rule 10.

Original Rule 12, promulgated August 7, 1797, 1 Cranch, xviii; 1 Wheat. xv; 1 Peters, vii. Revised and corrected at December Term, 1858, 21 How. v. Amendment promulgated November 13, 1882, 16 Otto, vii.

RULE 2. ATTORNEYS.

1. Admission of.—It shall be requisite to the admission of attorneys or counselors to practice in this court that they shall have been such for three years past in

the supreme courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair.

Original Rule 2, promulgated February 5, 1790, 2 Dall. 399; 1 Cranch, xvi; 1 Wheat. xlii; 1 Peters, vi. Revised and corrected December Term, 1858, 21 How. v.

Admission and removal of. — Court has exclusive power to determine qualifications for attorneys and counselors (Ex parte Secombe, 19 How. 13); but can only disbar them for moral or professional delinquency. Ex parte Tillinghast, 4 Peters, 108; Ex parte Garland, 4 Wall. 333; Ex parte Robinson, 19 Wall. 513; Ex parte Wall, 107 U. S. 265; U. S. v. Costen, 38 Fed. Rep. 24; Re Thomas, 36 Fed. Rep. 242.

2. Oath. — They shall respectively take and subscribe the following oath or affirmation, viz.:—

I, ———, do solemnly swear (or affirm) that I will demean myself, as an attorney and counselor of this court, uprightly and according to law, and that I will support the Constitution of the United States.

Original Rule 6, promulgated February 7, 1791, 2 Dall. 399; 1 Cranch, xvii; 1 Wheat. xlv; 1 Peters, vi. Revised and corrected December Term, 1858, 21 How. v.

Original Rules 3 and 4, promulgated February 5, 1790, 1 Cranch, xvi; 1 Wheat. xlii; and 1 Peters, vi; and Rule 14, 1 Cranch, xviii; 1 Wheat. xvi; and 1 Peters, vii; promulgated August 12, 1801, relative to distinguishing attorneys from counselors, abrogated on revision and correction at December Term, 1858, 21 How. v.

Amendment to the second clause, promulgated March 10, 1865, 2 Wall. vii, pursuant to act of Congress, 12 Stat. at Large, 502. Declared unconstitutional, Ex parte Garland, 4 Wall. 333. Was rescinded at the December Term, 1868, 4 Wall. vii.

RULE 3. PRACTICE.

How regulated. — This court considers the former practice of the courts of king's bench and of chancery in England as affording outlines for the practice of this court; and will, from time to time, make such alterations therein as circumstances may render necessary.

Original Rule 7, promulgated August 8, 1791, 1 Cranch, xviii; 2 Dall. 411; 1 Wheat. xlv; 1 Peters, vi. Revised and corrected December Term, 1858, 21 How. v.

Procedure.—Proceedings of this court, regulated by rules analogous to the English chancery practice. *Florida v. Georgia*, 17 How. 478. The English rules are not adopted (*Brown v. Aspden*, 14 How. 25); but must be followed where appropriate. *Rhode Island v. Massachusetts*, 12 Peters, 735. Where inconsistent or unjust they will not be followed. *Florida v. Georgia*, 17 How. 478; *Rhode Island v. Massachusetts*, 14 Peters, 210.

RULE 4. BILL OF EXCEPTIONS.

Allowance of.—The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court.

Original Rule 8, promulgated February 4, 1795, 1 Cranch, xvii; 1 Wheat. xiv.; 1 Peters, vi. Revised and corrected December Term, 1858, 21 How. vi.

Form of.—The charge of the court, at length, cannot be brought here for review (*Carver v. Astor*, 4 Peters, 1); the practice of so doing is censured (*Stimpson v. West Chester R. R. Co.* 4 How. 380; *Rogers v. The Marshall*, 1 Wall. 644); a mistake of law would be ground for an exception (*Lincoln v. Clafin*, 4 Wall. 132), which should be strictly confined to that mistake (*Railroad Co. v. Varnell*, 8 Otto, 479), and should be specifically set out in the record. *Harvey v. Tyler*, 2 Wall. 328; *Insurance Co. v. Sea*, 21 Wall. 158; *Beaver v. Taylor*, 3 Otto, 46; *U. S. v. Rinskopf*, 15 Otto, 418; *Johnston v. Jones*, 1 Black, 209. In trials without juries, the whole testimony cannot be brought up for review. *Norris v. Jackson*, 9 Wall. 125; *Evans v. Patterson*, 4 Wall. 224. Rulings of the court as to admission of evidence only can be brought here. *Suydam v. Williamson*, 20 How. 427; *Kearney v. Denn*, 15 Wall. 56. Exceptions to the exclusion of proper testimony are properly in the record (*Arthurs v. Hart*, 17 How. 6); but exceptions to the ad-

mission of improper testimony should be omitted. *Weems v. George*, 13 How. 190. The exception should state specifically the evidence objected to (*Elliot v. Piersol*, 1 Peters, 328; *Vasse v. Smith*, 6 Cranch, 226; *Camden v. Doremus*, 3 How. 515; *Zeller v. Eckert*, 4 How. 289); and only so much of it as necessary to properly present the rulings excepted to. *Zeller v. Eckert*, 4 How. 289; *Moore v. Bank of Metropolis*, 11 Peters, 302. The bill of exceptions is conclusive on the court (*Bingham v. Cabbot*, 3 Dall. 9), and they cannot presume that any material part is omitted (*U. S. v. Hodge*, 6 How. 279); and alleged errors not appearing on the face of the record will not be examined. *Storm v. U. S.* 4 Otto, 76; *Kerr v. Clampet*, 5 Otto, 188. But if, from an imperfectly drawn bill, it can ascertain the substance, it will decide the case (*U. S. v. Morgan*, 11 How. 154); but will not go outside of the record to find matter to support it. *Clarke v. Russel*, 3 Dall. 423; *Reed v. Gardener*, 17 Wall. 409; *Mut. L. I. Co. v. Snyder*, 3 Otto, 393. The bill need not be formally completed at the trial (*Walton v. U. S.* 9 Wheat, 651); but the exceptions may be noted at the trial, and afterwards reduced to form. *Ex parte Bradstreet*, 4 Peters, 102; *Brown v. Clark*, 4 How. 4; *Pennock v. Dialogue*, 2 Peters, 1; *Carver v. Astor*, 4 Peters, 80; *Phelps v. Mayor*, 15 How. 160; *Lathrop v. Judson*, 19 How. 66; *French v. Edward*, 13 Wall. 506; *Stanton v. Embrey*, 3 Otto, 548. They must be signed by the judge (*Genres v. Campbell*, 11 Wall. 193), at the term (*Hunnicat v. Peyton*, 12 Otto, 333; *Gregg v. Sayre*, 8 Peters, 244; *Magnia v. Thompson* 7, Peters, 348); or if afterwards, signing should be *nunc pro tunc* (*Walton v. U. S.* 9 Wheat, 651; *Insurance Co. v. Boon*, 5 Otto, 117); or they will constitute no part of the record. *Young v. Martin*, 8 Wall. 354; *Messina v. Cavazos*, 6 Wall. 356; *Pomeroy v. State Bank*, 1 Wall. 592.

RULE 5. PROCESS.

1. In name of U. S. — All process of this court shall be in the name of the President of the United States.

Original Rule 5, promulgated February 5, 1790, 1 Cranch, xvi; 2 Dall. 399; 1 Wheat. xiv; 1 Peters, vi. Revised and corrected December Term, 1858, 21 How. vi.

2. Service on State. — When process at common law, or in equity, shall issue against a State, the same shall

be served on the governor, or chief executive magistrate, and attorney-general, of such State.

Original Rule 10, promulgated August 12, 1796, 3 Peters, xvii; 3 Dall. 320. Adopted on revision December Term, 1858, 21 How. vi.

How made.—This court has original jurisdiction in suits against States (*New Jersey v. New York*, 5 Peters, 284); and fixes the rule respecting process in those suits. *Grayson v. Virginia*, 3 Dall. 320; S. C. 1 Pet. Cond. 141. Process should be directed to the State. *Florida v. Georgia*, 11 How. 293; *Rhode Island v. Massachusetts*, 7 Peters, 651. Service must be on governor and attorney-general. Service on one of them is not sufficient. *New Jersey v. New York*, 3 Peters, 461.

3. Subpoena, when served.—Process of subpoena, issuing out of this court in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and if the defendant, on such service of the subpoena, shall not appear at the return day, the complainant shall be at liberty to proceed *ex parte*.

Original Rule 10, promulgated August 12, 1796, 1 Cranch, xvii; 3 Dall. 320; 1 Wheat. xv; 1 Peters, vi. Revised and corrected December Term, 1858, 21 How. vi.

Rule followed. *New Jersey v. New York*, 5 Peters, 284; S. C. 3 Peters, 461.

RULE 6. MOTIONS.

1. To be in writing.—All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. Time allowed.—One hour on each side shall be allowed to the argument of a motion and no more, without special leave of the court granted before the argument begins.

Original Rule 51, promulgated January Term, 1838, 12 Peters, iv. Adopted on revision December Term, 1858, 21 How. vi. Amended December 18, 1876, 3 Otto, vii. See *Butler v. Gage*, 138 U. S. 52.

3. Notice requisite.—No motion to dismiss, except on special assignment by the court, shall be heard, unless

previous notice has been given to the adverse party, or the counsel or attorney of such party.

Original rule 31, promulgated December Term, 1867, 6 Wall. v. Revised and corrected December Term, 1870.

4. **When to be submitted.**—All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases, except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days.

Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless for satisfactory reasons further time be given by the court to either party.

Promulgated May 6, 1872, 13 Wall. xl.

5. **Motion to affirm.**—There may be united with a motion to dismiss a writ of error or an appeal a motion to affirm, on the ground that although the record may show that this court has jurisdiction it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

Promulgated May 6, 1872, 13 Wall. xl. Amended May 8, 1876, 1 Otto, vii; November 4, 1878, 7 Otto, vii, clause 3.

Note.—See construction of a similar rule. *Dzialynski v. Bank of Jacksonville*, 23 Fla. 45; *Whitney v. Cook*, 99 U. S. 607. A motion to dismiss a case for want of jurisdiction may be united with a motion to affirm. *Foster v. Kansas*, 112 U. S. 205.

To dismiss and affirm.—Where record is not printed motion to dismiss will not be considered. *National Bank v. Insurance Co.* 10 Otto, 43. Motion will be entertained before return day, if court clearly has no jurisdiction. *Clark v. Hancock*, 4 Otto, 493; *Ex parte Russell*, 13 Wall. 671; *Thomas v. Woolridge*, 23 Wall. 288. Party cannot complain that he had no notice of the motion, if he file a brief on its merits. *Thomas v. Woolridge*, 23 Wall. 288. A motion to affirm will be denied, if motion to dismiss cannot be sustained, the court clearly having jurisdiction (*Whitney v. Cook*, 9 Otto, 607); but in such case the motion to affirm will be granted; if writ taken for delay only (*Micas v. Williams*, 14 Otto, 536; *The S. C. Tryon*, 15 Otto, 267), or the questions of law have already been decided here. *Swope v. Leffingwell*, 15 Otto, 3. Where appellee has a color of right to dismissal, motion to affirm will be considered. *Whitney v. Cook*, 9 Otto, 607; *Hinckley v. Morton*, 13 Otto, 764.

6. Motion day.—The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that date to the other business of the court; the motion day shall be Monday of each week, and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

Original Rule 33, February Term, 1824, 9 Wheat. iv; 1 Peters. xl. Amended January Term, 1845, 3 How. v. Rule 27, in revision of 1853, 21 How. xv. Revised and corrected December Term, 1870. Amended December 14, 1874, 20 Wall. xv, clause 5.

Note.—A motion to affirm, on the ground that an appeal was taken for delay only, cannot be properly

coupled under this rule with a motion to dismiss founded on an alleged defect in the form of the condition of the appeal bond. *Gay v. Parpart*, 101 U. S. 391.

RULE 7. LAW LIBRARY.

1. **Use of books regulated.**— During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. It shall be the duty of the clerk to keep, in a book for that purpose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for, and forfeit and pay twice the value thereof; and also one dollar per day for each day's detention beyond the limited time.

Original Rule 39, January Term, 1833, 7 Peters, iv. Revised and corrected December Term, 1858, 21 How. vi.

2. The clerk shall deposit in the law library, to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

Promulgated, October 25, 1875, 1 Otto, vii, clause 3.

3. **Conference-room.**— The marshal shall take charge of the books of the court, together with such of the duplicate law books as Congress may direct to be transferred to the court, and arrange them in the conference-room, which he shall have fitted up in a proper manner, and he shall not permit such books to be taken therefrom by any one except the justices of the court.

Original Rule 39, January Term, 1833, 7 Peters, iv. Revised and corrected December Term, 1838, 21 How. vi, clause 2.

RULE 8. WRIT OF ERROR, RETURN, AND RECORD.

1. Return, how made.—The clerk of the court to which any writ of error may be directed shall make return of the same by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

Original Rule 11, February 13, 1797, 1 Cranch, xvii; 1 Wheat, xv; 1 Peters, vii. Revised December Term, 1838, 21 How. vii, January 4, 1834.

Note.—A motion to dismiss is made under this rule, but the court may dismiss the writ of error and permit plaintiff in error to withdraw the record for the purpose of suing out a new writ. *Blitz v. Brown*, 7 Wall. 693.

Return, by whom made.—A return by the clerk is necessary (*Blitz v. Brown*, 7 Wall. 693), and is sufficient (*Stewart v. Ingle*, 9 Wheat. 526); the judge's signature is not requisite. *Worcester v. Georgia*, 6 Peters, 515. On neglect or refusal of clerk to make return, court will compel him to do so. *U. S. v. Booth*, 18 How. 476.

2. Opinions annexed to record.—In all cases brought to this court by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

Promulgated April 28, 1873, 15 Wall. v.

State courts.—The opinion of State courts made a part of the record is authority as to decision of points of law in that court. *Coussic v. Blanc*, 19 How. 202. The opinion of the court below is no part of the record, although required so to be annexed and transmitted. *England v. Gebhart*, 112 U. S. 502.

3. What to be filed.—No case will be heard until a complete record, containing in itself, and not by refer-

ence, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

Original Rule 30, promulgated February Term, 1823, 8 Wheat. vi; 1 Peters, x. Revised and corrected December Term, 1858, 21 How. vii.

Contents of record.—The cause will not be heard unless a complete record is filed (*Keen v. Whittaker*, 13 Peters, 459; *Veitch v. Farmers' Bank*, 6 Peters, 776); and where record is improperly prepared cause will be remanded. *Estho v. Lear*, 7 Peters, 130. As to contents of record generally, see *Crowell v. Randall*, 10 Peters, 368. No papers or evidence will be considered as part of the record unless made so by the pleadings or opinion of the court. *Fisher v. Cockrell*, 5 Peters, 254; *Pennock v. Dialogue*, 2 Peters, 1. It is not necessary nor proper that the record should contain an agreed statement of the facts (*Curtis v. Petitpain*, 18 How. 109), or an agreement as to damages (*Lanusse v. Barker*, 3 Wheat. 102), or the reasons for a judgment, except it be the opinion of the court. *Williams v. Norris*, 12 Wheat. 117; *Davis v. Packard*, 6 Peters, 41. Nor need there appear such matters as affidavits (*Campbell v. Rankin*, 9 Otto, 261), citations (*Innerarity v. Byrne*, 5 How. 295), or the names of jurors. *Owens v. Hanney*, 9 Cranch, 180. That these matters are certified by the clerk does not make them part of the record (*Reed v. Marsh*, 13 Peters, 153), and the practice of burdening the record with them is discountenanced. *Magnia v. Thompson*, 7 Peters, 348.

4. Original papers.—Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in this court, upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

Original Rule 25, February Term, 1817, 2 Wheat. 1; 1 Peters, ix. Revised and corrected December Term, 1858, 21 How. vii.

Inspection of originals.—Where an inspection of original papers is material, they will be ordered to be sent up (*The Elsinour*, 1 Wheat. 439); but this order is made only in cases of positive necessity. *Craig v. Smith*, 10 Otto, 226.

5. Writ, when returnable.—All appeals, writs of error and citations must be made returnable not exceeding thirty days from the day of signing the citations, whether the return day fall in vacation or in term time, and be served before the return day.

Original Rule 33, December Term, 1867, 6 Wall. vi. Revised and corrected December Term, 1870. Amendment promulgated January 26, 1891, 137 U. S. 710.

Time extended.—See clause 4 of Rule 9, *post*, extension “thirty days” to “sixty days” in certain States and Territories.

Service and return of writ.—A citation and return are indispensable to jurisdiction (*Alviso v. U. S.* 5 Wall. 824); and in absence of them the cause will be dismissed (*Hogan v. Ross*, 9 How. 602; *Garrison v. Cass Co.* 5 Wall. 823), unless citation is waived by appearance (*Alviso v. U. S.* 5 Wall. 824); but an agreement of parties without an allowance of appeal and writ of error cannot give this court appellate jurisdiction. *Washington Co. v. Durant*, 7 Wall. 694; *Mossman v. Higginson*, 4 Dall. 12; *Blair v. Miller*, 4 Dall. 21. The writ is served by leaving a copy for the adverse party in the office of the clerk of the court where judgment was rendered. *Wood v. Lide*, 4 Cranch, 179. It must be made returnable on the day mentioned in the rule and no other. *Insurance Co. v. Mordecai*, 21 How. 200; *Porter v. Foley*, 21 How. 393. If after proper service defendant appear, objections to irregularity of return are waived. *Wood v. Lide*, 4 Cranch, 180. The cause will not be taken up until thirty days after service unless defendant appear therein. *Lloyd v. Alexander*, 1 Cranch, 111.

6. Record in admiralty and maritime causes, contents of.—The record in cases of admiralty and maritime jurisdiction, when, under the requirements of law, the facts have been found in the court below, and the power of

review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

Promulgated May 2, 1881, 13 Otto, xlii.

Object of rule.—The *Adriatic*, 103 U. S. 730.

RULE 9. DOCKETING CASES.

1. Duties of parties.—It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

Original Rule 16, February Term, 1803, 1 Cranch, xviii; 1 Wheat. xvi; 1 Peters, vii. Rule 19, February Term, 1806, 1 Wheat. xvi; 1 Peters, viii. Rule 32, promulgated February Term, 1821, 6 Wheat. vi. Rule 29, 1 Peters, x. Rule 43, January Term, 1835, 9 Peters, vii. Rule 63, December Term 1853, 16 How. ix. Revised December Term, 1858, 21 How. vii. Amendment promulgated January 26, 1891, 137 U. S. 710.

Docketing causes — Dismissals.—Appeals must be prosecuted by filing the record within the term next after

appeal is taken (*Mesa v. U. S. 2 Black, 721*; *Castro v. U. S. 3 Wall. 46*); or if taken during term, within requisite time at next term (*Stafford v. Union Bank, 16 How. 135*; *Castro v. U. S. 3 Wall. 46*; *Str. Virginia v. West, 19 How. 182*; *U. S. v. Boisdore, 7 How. 658*); and time will not be extended, though clerk certify that he cannot prepare record within time allowed (*Sturges v. Harrold, 18 How. 41*); but if party is prevented through fraud from filing record in proper time, rule will not apply. *U. S. v. Gomez, 3 Wall. 752*. Where no record is filed, the appeal will be dismissed (*Veitch v. Farmers' Bank, 6 Peters, 776*; *U. S. v. Fremont, 18 How. 30*; *Grigsby v. Purcell, 9 Otto, 505*), upon production of clerk's certificate, that appeal was taken and not prosecuted. *The Jonquille, 6 Wheat, 452*; *Randolph v. Barbour, 6 Wheat. 123*. The clerk's certificate should show accurately the title of the cause (*Holliday v. Batsen, 4 How. 645*), and the names of the parties severally (*Smith v. Clark, 12 How. 21*), and the date when the judgment was rendered. *Rhodes v. S. S. Galveston, 10 How. 144*. But production of original writ and citation are equivalent to the clerk's certificate. *Amis v. Pearle, 15 Peters, 211*. The dismissal may be on motion of appellee (*U. S. v. Fremont, 18 How. 30*; *Grigsby v. Purcell, 9 Otto, 505*), or by the court of its own motion. *Grigsby v. Purcell, 9 Otto, 505*; *Edmonson v. Bloomshire, 7 Wall. 306*. Where the appeal is not perfected by filing of record, it is void (*Edmonson v. Bloomshire, 7 Wall. 306*; *The Lucy, 8 Wall. 307*), and having been thus dismissed, can only be remedied by a new appeal (*Rogers v. Law, 21 How. 526*), taken within the time limited by law therefor. *Str. Virginia v. West, 19 How. 182*; *U. S. v. Pacheco, 20 How. 261*; *Yeaton v. Lenox, 8 Peters, 123*; *Revised Statutes, § 635, ante, p. 165*; *Revised Statutes, § 1008, ante, p. 573*. Of contemporaneous motions, to docket and to dismiss the former will be allowed. Owing *v. Tiernan, 10 Peters, 24*. The rule to dismiss will not apply where the record is filed before the motion to dismiss (*Bingham v. Morris, 7 Cranch, 99*; *Pickett's Heirs v. Legerwood, 7 Peters, 144*), at any time within the term after appeal is taken. *Sparrow v. Strong, 3 Wall. 97*. Cause will be reinstated after dismissal, when no injustice will be to opposite party (*Gwin v. Breedlove, 15 Peters, 284*), as where cause, if docketed

could not have been reached during the term. *Gwin v. Breedlove*, 15 Peters, 284. A dismissal on failure to file record does not of itself amount to an affirmance. *U. S. v. Gomez*, 23 How. 326.

2. Rights of appellee.—But the defendant in error or appellee may, at his option docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

Original Rule 43, January Term, 1835, 9 Peters, vii. Rule 63, December Term, 1853, 21 How. viii. Amendment promulgated January 23, 1891, 137 U. S. 710.

Rights of parties.—Where appellee docket cause and file record, and appellant fail to do so, cause will be dismissed or may be set for argument (*Str. Virginia v. West*, 19 How. 182); but if appellant also docket cause and file record in proper time, case made by appellee will be dismissed. *Hartshorn v. Day*, 18 How. 29. Appellant may, on motion, in discretion of court, file transcript at any time within the term, and have cause reinstated. *U. S. v. Swan*, 3 Peters, 68.

3. Appearance of counsel.—Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

Original Rule 31, promulgated December Term, 1867, 6 Wall. v. Revised and corrected December Term, 1870.

Effect of appearance.—An appearance is a waiver of all objection to irregularity in the citation (*Carroll v. Dorsey*, 20 How. 204), or in the return to the writ of error. *Wood v. Lide*, 4 Cranch, 180. It cures all antecedent error, and no plea of abatement can be put in (*Knox v. Summers*, 3 Cranch, 496); but it does not preclude a dismissal for want of jurisdiction except on the ground of such irregularities. *U. S. v. Yates*, 6 How. 605. Counsel entering appearance under the rule will

be held responsible for all that such entry implies (*Hurley v. Jones*, 7 Otto, 318), as for the due prosecution of the suit (*Hurley v. Jones*, 7 Otto, 318); and after appearance notice to counsel is equivalent to notice to the parties. *Hurley v. Jones*, 7 Otto, 318. Appearance of counsel for party docketing the case must be entered on filing the transcript. *Green v. Elliott*, 137 U. S. 615.

4. Time extended.—In all cases where the period of thirty days is mentioned in Rule 8, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska, and Idaho.

Original Rule 63, promulgated December Term, 1853, 16 How. ix. Revised December Term, 1858, 21 How. viii. Amended March 10, 1865, 2 Wall. viii. Revised and corrected December Term, 1870. Amendment promulgated January 26, 1891, 137 U. S. 710.

Docketing and dismissing.—Where the cause is docketed and appellant does not file record within sixty days, appeal will on motion be dismissed. *German v. U. S.* 5 Wall. 825; *Castro v. U. S.* 3 Wall. 46.

RULE 10. PRINTING RECORDS.

1. Undertaking for fees.—In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

Original Rule 20, February Term, 1807, 4 Cranch, 537; 1 Wheat. xvii; 1 Peters, viii. Amended Rule 37, January Term, 1831, 5 Peters, vii, 724. Revised and corrected December Term, 1858, 21 How. viii. Amended May 8, 1876, 1 Otto, vii. The practice since 22 Stat. 631 indicated in *Green v. Elbert*, 137 U. S. 615.

Failure to give bond.—The clerk is not bound to docket a cause until bond for his fees is given (*Van Rensselaer v. Watts*, 7 How. 784; *Edwards v. U. S.* 12 Otto, 577); and if no fee bond is filed, writ or appeal will be dismissed (*Owings v. Tiernan*, 10 Peters, 447; *West v. Brashear*, 12 Peters, 101), and the cause will not be reinstated, though bond is then filed. *Selma etc. R. R.*

Co. v. La. Nat. Bank, 4 Otto, 253. See *Johnson v. Polk County*, 23 Fla. 58.

2. Estimate and payment of fees.—The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, after March 1, 1884, the case shall be dismissed.

3. Copies printed.—Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. Copy for printer.—In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. Printing and distribution.—The clerk shall supervise the printing, and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

Original Rule, January Term, 1831, 5 Peters, vii, 724. Revised and corrected December Term, 1858, 21 How. ix. Clauses 5 and 6, rescinded and above clause adopted November 13, 1882, 16 Otto, vii. Validity, see 5 Peters, 724.

6. Surplus or deficiency of cost.—If the actual cost of printing the record, together with the fee of the clerk,

shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. **Cost of printing taxed.**—In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

January 4, 1884.

8. **Attachment for fees.**—Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of the said fees.

Original Rule 21, February Term, 1808, 4 Cranch, 537; 1 Wheat, xviii; 1 Peters, viii. Revised December Term, 1868, 21 How. ix, clause 7.

Liability for costs.—Each party is liable to the clerk for the fees due to him from them, respectively. *Caldwell v. Jackson*, 7 Cranch, 276.

9. **Statement of errors relied on, to be filed.**—The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof and forthwith serve on the adverse party a copy of such statement. The adverse party within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not

do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

Promulgated March 23, 1837, 120 U. S. 735.

RULE 11. TRANSLATIONS.

How supplied.—Whenever any record, transmitted to this court upon a writ of error or appeal, shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court in order that a translation may be there supplied and inserted in the record.

Original Rule 60, promulgated December Term, 1851, 12 How. xi.
Revised and corrected December Term, 1853, 21 How. ix.

RULE 12. EVIDENCE.

1. Further proof.—In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission to be issued from this court, or from any circuit court of the United States.

Original Rule 25, promulgated February Term, 1816, 1 Wheat. xix. Rule 24, 1 Peters, ix. Revised and corrected December Term, 1858, 21 How. ix.

Allowance of further proof.—Further proof will be ordered when the facts are not sufficiently clear (The *Grotius*, 8 Cranch, 456; The *Adeline*, 9 Cranch, 244; The *Venus*, 1 Wheat. 113; The *George*, 1 Wheat. 408; The *Freundschaft*, 3 Wheat. 48); or where the evidence is so contradictory or ambiguous as to render decision difficult. The *Samuel*, 1 Wheat. 9; The *Western Metropolis*, 12 Wall. 389. It is not ordered as a matter of course, but only when the interests of the case clearly require it. The *Sally Magee*, 3 Wall. 452; The *Gray Jacket*, 5 Wall. 342. The evidence before the court will always be first examined, to decide whether proper to admit further proof. The *London Packet*, 7 Wheat. 372. When further proofs proposed would be insufficient to make out a case, a commission for the purpose will be refused. The *Euphrates*, 8 Cranch, 385; *Hazard v. Campbell*, 8 Cranch, 205. Where evidence has been fraudulently suppressed, innocent party may usually make further proof. The *St. Lawrence*, 8 Cranch, 434; *Dos Hermanos*, 2 Wheat. 77; The *Fortuna*, 3 Wheat. 237; The *Gray Jacket*, 5 Wall. 342. If, on commission for further proof, all the necessary evidence is not taken, a second commission for further proof will issue. The *Frances*, 8 Cranch, 348. Neglect or refusal to produce further proof on an order therefor is generally fatal to the party's claim. *La Nereyda*, 8 Wheat. 108. Depositions taken as further proof in one cause cannot be used therefor in another. The *Experiment*, 4 Wheat. 84. New evidence will be admitted only in admiralty and prize causes (Revised Statutes, § 698, *ante*, p. 315; The *Argo*, 2 Wheat. 289), and not in equity causes. *Blease v. Garlington*, 92 U. S. 1; *Roemer v. Simon*, 91 U. S. 149; *Holmes v. Trout*, 7 Peters, 171; *Mitchell v. U. S.* 9 Peters, 711; *Boone v. Chiles*, 10 Peters, 177.

2. In maritime cases.—In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof;

and no such commission shall issue but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice; *provided, however*, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where, by law, it is admissible.

Original Rule 32, promulgated February Term, 1817, 2 Wheat. vii; 1 Peters, ix. Revised and corrected December Term, 1853, 21 How. x.

New Evidence.—In cases of admiralty and prize only will new evidence be admitted here (Revised Statutes, § 698, *ante*, p. 315; *The Argo*, 2 Wheat. 289), and to take such evidence a commission will be granted (*Hawthorne v. U. S.* 7 Cranch, 107; *The Frances*, 8 Cranch, 353; *The Western Metropolis*, 12 Wall. 389), which must issue strictly according to the rules (*The Argo*, 2 Wheat. 289; *The London Packet*, 2 Wheat. 371); deposition *de bene esse* are not allowed. *The London Packet*, 2 Wheat. 289. The court will decide whether the evidence is admissible before it will issue a commission. *The Ocean Queen*, 6 Blatchf. 24. Where it is desired to examine a witness in this court, proper reasons should be given why examination was not made in lower court (*The Mabey*, 10 Wall. 419), as that the attendance of the witness could not be obtained (*The Mabey*, 10 Wall. 419), or that the evidence was discovered after the appeal. *The Western Metropolis*, 12 Wall. 389.

RULE 13. OBJECTIONS TO EVIDENCE IN THE RECORD.

In equity and admiralty.—In all cases of equity or admiralty jurisdiction heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

Original Rule 32, promulgated February Term, 1824, 9 Wheat. iv; 1 Peters, xl. Revised and corrected December Term, 1853, 21 How. x.

Objections to evidence. — Objections cannot be taken for the first time in this court to matters appearing on the record, such as deeds (*Mitchell v. U. S.* 9 Peters, 711), depositions or exhibits (*Mechanics' Bank v. Seton*, 1 Peters, 299; *Harrison v. Nixon*, 9 Peters, 536), or to the reports of a master in chancery (*Canal Co. v. Gordon*, 6 Wall. 561), or a referee. *Lumber Co. v. Buchtel*, 11 Otto, 633. If proper objection is taken in the lower court and objection appears on the record, it will be examined here (*The Pizarro*, 2 Wheat. 227); but where the objection is not on the record, it is deemed to have been waived. *The Pizarro*, 2 Wheat. 227; *Hinde v. Longworth*, 11 Wheat. 206; *Brockett v. Bröckett*, 3 How. 691. The party is confined to the specific objection taken at the trial. *Hinde v. Longworth*, 11 Wheat. 209. Where a general objection is made, but no specific ground given therefor, this court will not consider the objection. *Thomas v. Lawson*, 21 How. 331.

RULE 14. CERTIORARI.

Diminution of record. — No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari* must be made at the first term of the entry of the case; otherwise the same will not be granted, unless upon special cause shown to the court accounting satisfactorily for the delay.

Original Rule 31, promulgated February Term, 1824, 9 Wheat. iv; 1 Peters, x. Revised and corrected December Term, 1853, 21 How. v.

Certiorari for diminution, purpose of. — Where the clerk certifies the record to be full, a dissatisfied party must resort to remedy of suggestion of diminution (*U. S. v. Gomez*, 1 Wall. 690), and on motion, the deficiency, if any, may be supplied by *certiorari* (*The Rio Grande*, 19 Wall. 178; *Field v. Milton*, 3 Cranch, 513; *Stimpson v. West Chester R. R. Co.* 3 How. 553); or party may dismiss the writ and proceed anew. *Elmore v. Grymes*, 1

Peters, 469. To the proper issuance of a *certiorari*, it should appear on the face of the record that there is a material deficiency. *Holmes v. Trout*, 7 Peters, 210. When a paper of importance appears to be missing, or defendant's counsel does not appear, it may be brought up on *certiorari* by the court of its own motion. *Morgan v. Curtenius*, 19 How. 8. *Certiorari* is not the proper remedy to correct a transcript from which the clerk's certificate is omitted. *Hodges v. Vaughan*, 19 Wall. 12. Nor should it be used to show existence of facts not in the findings. *U. S. v. Adams*, 9 Wall. 661. If it appear for the first time at the argument that indispensable matter is omitted, court of its own motion may allow *certiorari* and time for return thereto. *Sweeney v. Lonme*, 22 Wall. 208. Where delay is accounted for, *certiorari* to correct record will be granted even at third term (*Stearns v. U. S.* 4 Wall. 1); but the hearing of the cause if reached before return of writ will not be postponed on that account. *Clark v. Hackett*, 1 Black, 77. The court will not reopen a cause, and allow *certiorari* to correct record after judgment. *Gayler v. Wilder*, 10 How. 509. The clerk's return to a *certiorari* is sufficient; it need not be made by the judge. *Stewart v. Ingle*, 9 Wheat. 526.

RULE 15. DEATH OF PARTY.

1. *Revivor*.—Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order, that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving

shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed if it be erroneous; *provided, however*, that a copy of every such order shall be printed in some newspaper of general circulation within the State, Territory, or district from which the case is brought for three successive weeks, at least sixty days before the beginning of the term of the supreme court then next ensuing.

Original Rule 31, promulgated February Term, 1821, 6 Wheat. v; 1 Peters, ix. Revised and corrected December Term, 1858, 21 How. x. Amended December 11, 1879, 10 Otto, ix.

Note.—Where an appeal has been dismissed pursuant to this rule, the decree of dismissal, or cause shown, may be rescinded upon the proper representatives of the deceased party being made parties to the suit and their appearance being entered, under the rule. *Randolph v. Quidneck Co.* 31 U. S. 444. Where one of a number of parties dies, the cause survives to the other parties (*McKinney v. Carroll*, 12 Peters, 63), and when suggestion of his death is made on the record, a judgment will be valid against the others as survivors. *McNutt v. Bland*, 2 How. 28. The decree will not be defeated by the death of the party while the cause is under advisement (*Clay v. Smith*, 3 Peters, 441); or is decided without knowledge of the death of the party (*U. S. Bank v. Weisiger*, 2 Peters, 481); for the court will order the decree entered as of the first day of the term. *U. S. Bank v. Weisiger*, 2 Peters, 481; *McNutt v. Bland*, 2 How. 28. On suggestion of death of appellee and appearance for executor, court will entertain a motion to dismiss for want of prosecution. *Hook v. Linton*, 10 Peters, 107; *Green v. Watkins*, 6 Wheat. 260. If death happens after dismissal of writ, application to revive cause must be in lower court. *McClane v. Boon*, 6 Wall. 244; *Taylor v. Savage*, 1 How. 282.

2. When action abates.—When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no measures are

taken by the opposite party within that time to compel their appearance, the case shall abate.

Original Rule 61, promulgated December Term, 1851, 13 How. v. Revised and corrected December Term, 1858, 21 How. xl.

Abatement.—Rule followed, see *Phillips v. Preston*, 11 How. 294; *Barribeau v. Brant*, 17 How. 43.

3. **Death at time of taking writ.**—When either party to a suit in a circuit court of the United States shall desire to prosecute a writ of error or appeal to the supreme court of the United States from any final judgment or decree rendered in the circuit court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead, and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error, or appellant, shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, and stating therein the name and character of such representative, and the State or Territory in which such representative resides;

and upon such suggestion he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and on hearing have the judgment or decree reversed if the same be erroneous; *provided, however*, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the supreme court then next ensuing; and *provided*, also, that in every such case, if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required by the opposite party, the case shall abate; and *provided*, also, that the said representative may, at any time, before or after said suggestion, come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

Promulgated January 12, 1875, 20 Wall. xv.

RULE 16. NO APPEARANCE OF PLAINTIFF.

At trial.—Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for a trial the defendant may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

Original Rule 13 1-2, promulgated February Term, 1806; 3 Cranch, 249; 3 Peters, xvii. Revised and corrected December Term, 1858, 21 How. xi.

Effect of.—Where plaintiff's counsel withdraw appearance they are subject to dismissal or affirmance as though no appearance was filed. *McGuire v. Common-*

wealth, 3 Wall. 382; *Rhode Island v. Massachusetts*, 12 Peters, 757. Where no just cause can be shown for plaintiff's non-appearance cause will not be reinstated over appellee's objection. *Hurley v. Jones*, 7 Otto, 318; *Alvord v. U. S.* 9 Otto, 593; *James v. McCormack*, 15 Otto, 265. Dismissal under this rule should be with costs. *Montalet v. Murray*, 3 Cranch, 249. Dismissal of a petition of right under this rule, see *Miller v. Edgerton*, 140 U. S. 690.

RULE 17. NON-APPEARANCE OF DEFENDANT.

At trial.—Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

Original Rule 15, promulgated December 9, 1801, 1 Cranch, xviii; 1 Wheat. xvi; 1 Peters, vii. Amended December Term, 1858, 21 How. xl.

Effect of.—Appellee's appearance is of no importance to appellant (*U. S. v. Yates*, 6 How. 605), and the court will not compel the appearance of appellee, but will follow the rule. *Grayson v. Virginia*, 3 Dall. 320; *Oswald v. New York*, 2 Dall. 415; *Chisholm v. Georgia*, 2 Dall. 419.

RULE 18. NON-APPEARANCE OF EITHER PARTY.

At call of docket.—When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

Original Rule 54, promulgated January Term, 1850, 8 How. v. Repealed by Rule 29, promulgated December Term, 1851, 12 How. ix. Revised and corrected December Term, 1858, 21 How. xl.

Dismissal.—Rule followed, see *Rodford v. Craig*, 5 Cranch, 289.

RULE 19. NEITHER PARTY READY.

At second term, dismissal.—When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue

it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement.

Original Rule 55, promulgated January Term, 1850, 8 How. vi. Revised and corrected December Term, 1858, 21 How. xi.

RULE 20. PRINTED ARGUMENTS.

1. **Distribution of copies.**—In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and in addition appeals from the court of claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but twenty-five copies of the arguments, signed by attorneys or counselors of this court, must be first filed.

Original Rule 40, promulgated January Term, 1833, 7 Peters, iv. Amended January 7, 1842, 16 Peters, vii. Amended January Term, 1845, 3 How. vi. Amended January Term, 1850, 8 How. vi. Revised December Term, 1858, 21 How. xii. Amended March 10, 1865, 2 Wall. viii. Amended December Term, 1865, 3 Wall. viii. Amended March 3, 1875, 21 Wall. v. October 31, 1887, 123 U. S. 759.

What received.—Papers will not be received or examined unless presented in court and shown to opposite counsel. *Mitchell v. U. S.* 8 Peters, 307. Where arguments are improperly prepared submission will be set aside, and cause restored to docket. *School Dist. v. Ins. Co.* 11 Otto, 472. Where a submission was made, but the record did not show the matter in dispute to exceed the value of five thousand dollars, and the court on its own motion dismissed the case, it refused afterwards to consider affidavits to supply the defect on the record. *Johnson v. Wilkins*, 118 U. S. 228. Where counsel on both sides stipulated in writing to submit a case under this rule, and no argument is filed in behalf of the plaintiff in error, but one is filed in behalf of the defendant in error, under the stipulation, the court will take the case as submitted, and affirm the judgment without passing specially upon the assignments which

were returned with the record. *Aurrecoechea v. Bangs*, 110 U. S. 217.

2. **Effect of filing.**—When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

Promulgated December Term, 1858, 21 How. xii.

3. **When oral argument presented.**—When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

Original Rule 58, promulgated December Term, 1850, 10 How. v. Revised and corrected December Term, 1858, 21 How. xii.

Note.—Where no time is mentioned in the stipulation, a motion to require defendant in error to submit under this clause, to which no reference is made in the stipulation, will be denied if opposed. *Glenn v. Fant*, 124 U. S. 123.

4. **Brief not received after argument.**—No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

Promulgated January 12, 1875, 20 Wall. xvi.

RULE 21. BRIEFS.

1. **Counsel for plaintiff.**—The counsel for the plaintiff in error, or appellant, shall file with the clerk of the court, at least six days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

Original Rule 30, promulgated February Term, 1821, 6 Wheat. v. Rule 27, 1 Peters, ix. Original Rule 53, promulgated December Term, 1849, 7 How. v; 8 How. v. Rule 58, promulgated April 24, 1850, 8 How. v. Rule 21, clause 6, promulgated December Term, 1858, 21 How. xii. Amended February 9, 1865, 2 Wall. viii. Amended May 1, 1871, 11 Wall. ix. Amended November 16, 1872, 14 Wall. ix.

Briefs to be filed.—If no brief is filed by plaintiff's counsel the appeal may be dismissed (*Portland Cement Co. v. U. S.* 15 Wall. 1), or the judgment affirmed (*Ryan v. Koch*, 17 Wall. 19); but the cause may be reinstated on consent of defendant. *Catharine v. U. S.* 7 Cranch, 99.

2. Brief, what to contain.—This brief shall contain *in the order here stated* :—

I. STATEMENT.—A concise abstract, or statement of the case presenting succinctly the questions involved and the manner in which they are raised.

II. ERRORS ASSIGNED.—A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged, and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.

Original clause 7, promulgated May 1, 1871, 11 Wall. ix. Amended November 16, 1872, 14 Wall. xii.

When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused.

When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

Original clause 6, promulgated May 1, 1871, 11 Wall. ix. Amended November 16, 1872, 14 Wall. xii, sub. 5.

Error, assignment of.—Where the error is not set out specifically it will be held insufficient (*Lucas v. Brook*,

18 How. 436; *Scholey v. Rew*, 23 Wall. 331), even though the errors are apparent on the record (*Deitsch v. Wiggins*, 15 Wall. 539); and if none of the errors are properly assigned the appeal may be dismissed (*Portland Co. v. U. S.* 15 Wall. 1), or judgment affirmed. *Ryan v. Koch*, 17 Wall. 19.

III. POINTS OF LAW OR FACT.—A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon it in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

Promulgated May 1, 1871, 11 Wall. ix. Amended November 16, 1872, 14 Wall. xi.

Contents of brief.—A statement of the case must be filed, though the question is only one of fact. *Reilly v. Lamar*, 2 Cranch, 347, note. Unlimited assignments of error are a perversion of the rule. When made, only such assignments as seem material will be considered. *Phillips & Co. v. Seymour*, 1 Otto, 648. Unless the rule as to setting out statute is observed, submission will be set aside. *School Dist. v. Ins. Co.*, 11 Otto, 472.

3. Counsel for appellee, brief of.—The counsel for a defendant in error, or an appellee, shall file with the clerk twenty-five printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

Original Rule 30, promulgated February 7, 1821, 6 Wheat. v. Rule 27, 1 Peters, ix. Rule 53, promulgated December Term, 1849, 7 How. v; 8 How. v. Rule 21, clause 6, promulgated December Term, 1858, 21 How. xii. Amended February 9, 1865, 2 Wall. viii. Amended May 1, 1871, 11 Wall. ix. Amended November 16, 1872, 14 Wall. xi.

4. Errors not assigned disregarded.—When there is no assignment of errors, as required by section 997 of the

Revised Statutes, counsel will not be heard, except at the request of the court, and errors not specified according to this rule will be disregarded, but the court at its option may notice a plain error not assigned or specified.

Promulgated May 1, 1871, 11 Wall. x. Amended November 16, 1872, 14 Wall. xii.

Assignment of errors.—See note to clause 5 of this rule. Defendant may move to dismiss writ, or may open record and pray an affirmance when there is no assignment or no proper assignment of errors (*Maxwell v. Stewart*, 21 Wall. 71), or no error so plain that it ought to be noticed without assignment. *Treat v. Jennison*, 20 Wall. 652. Where defendant do not assign an error against him, it will not be corrected on plaintiff's writ. *Tilden v. Blair*, 21 Wall. 241. A failure to annex to or return with a writ of error an assignment of errors, is no ground for dismissal, if the assignment is filed in accordance with this section (*School Dist. v. Hall*, 106 U. S. 428); and where no counsel appeared for plaintiff in error the judgment was affirmed under this section. *Dugger v. Tayloe*, Bk. 30 U. S. L. ed. 946.

5. Default, effect of.—When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion, and when a defendant in error or an appellee is in default, he will not be heard except on consent of his adversary, and by request of the court.

Original Rule 53, promulgated December Term, 1849, 7 How. v; 8 How. v. Rule 21, clauses 3 and 5, promulgated December Term, 1858, 21 How. xii. Amended May 1, 1871, 11 Wall. ix. Amended November 16, 1872, 14 Wall. xii.

6. Effect of default on argument.—When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

Original Rule 21, clause 7, promulgated December Term, 1858, 21 How. xiii. Rule 21, clause 12, promulgated May 1, 1871, 11 Wall. x. Amended November 16, 1872, 14 Wall. xii.

RULE 22. ORAL ARGUMENT.

1. Opening and close.—The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

Promulgated December Term, 1858, 21 How. xii.

2. Two counsel.—Only two counsel will be heard for each party on the argument of a case.

Original Rule 23, promulgated February Term, 1812, 1 Wheat. xviii; 1 Peters, ix; December Term, 1870, 11 Wall. ix; December Term, 1858, 21 How. xii; Rule 21, amended November 16, 1872, 14 Wall. xi, clause 1.

Counsel, number of.—Only two counsel for each party can be heard on the argument (Anonymous, 7 Cranch, 1); the cause cannot be divided into distinct points and two counsel be heard on each point. Anonymous, 7 Cranch, 1. In cases of great importance this rule will be dispensed with. *McCulloch v. Maryland*, 4 Wheat. 322, note; *The Gray Jacket*, 5 Wall. 370.

3. Two hours for argument.—Two hours on each side shall be allowed for the argument and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; *provided, always*, that a fair opening of the case shall be made by the party having the opening and closing arguments.

Original Rule 53, promulgated January Term, 1849, 7 How. v; 8 How. v. Revised December Term, 1858, 21 How. xii. Amended May 1, 1871, 11 Wall. ix. Amended November 16, 1872, 14 Wall. xi.

Further time.—Under special circumstances, or important cases, further time will be allowed. *The Gray Jacket*, 5 Wall. 370.

RULE 23. INTEREST.

1. On affirmance.—In cases where a writ of error is prosecuted to this court, and the judgment of the in-

ferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

Original Rule 62, promulgated December Term, 1851, 13 How. v. Amended December Term, 1858, 21 How. xiii.

Rate of interest.— Under original rule, rate was six per cent from judgment to date of affirmance. *Sneed v. Wister*, 8 Wheat. 690; *Brown v. Van Braam*, 3 Dall. 356; *Mitchell v. Harmony*, 13 How. 116. The present rate is the amount allowed in State where judgment is rendered. *Perkins v. Fourniquet*, 14 How. 328; *R. R. Co. v. Turrill*, 11 Otto, 836. Where no legal rate of interest is fixed by State statutes, reasonable rate will be allowed as damages. *Young v. Godbe*, 15 Wall. 563. Rule not applicable to admiralty cases; discretionary with court to allow any interest. *Hemmenway v. Fisher*, 20 How. 255; *Himely v. Rose*, 5 Cranch, 313; *The Santa Maria*, 10 Wheat. 431.

2. Damage on frivolous appeal.— In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay damages at a rate not exceeding ten per cent in addition to interest, shall be awarded upon the amount of the judgment.

Original Rules 17, 18, promulgated February Term, 1803, 1 Cranch, xviii. Original clause 3, December Term, 1858, 21 How. xiii. Amended May 1, 1871, 11 Wall. x.

Damages for delay.— Where the judgment is affirmed, damages may be allowed for delay (*Cotton v. Wallace*, 3 Dall. 302), which damage may be single or double. Rev. Stats. § 1010, *ante*, p. 574. The court is the sole judge of the propriety of allowing damages for delay. *Boyce v. Grundy*, 9 Peters, 275. The judgment will usually be affirmed with damages, where no question was raised for consideration of the court, either below or here (*Kilbourne v. State Sav. Inst.*, 22 How. 503; *Sutton v. Baneroff*, 23 How. 320; *Jenkins v. Banning*, 23 How. 455; *Prentice v. Pickersgill*, 6 Wall. 511; *Camp-*

bell *v.* Wilcox, 10 Wall. 421; *Ins. Co. v. Huchbergers*, 12 Wall. 104; *Heenesy v. Sheldon*, 12 Wall. 440; *Hall v. Jordan*, 19 Wall. 271; *West Wisc. R. R. Co. v. Foley*, 4 Otto, 100; *Whitney v. Cook*, 9 Otto, 606, or where the case is brought here in disregard of the law as settled here by precedent (*Pennywit v. Eaton*, 15 Wall. 382), or brought solely for the purpose of delaying payment of a just debt. *Barrow v. Hill*, 13 How. 55. But where it is prosecuted in good faith, though unsuccessfully, damages are not allowed. *McKee v. Rains*, 10 Wall. 22; *McNeil v. Holbrook*, 12 Peters, 84. The cause will not be dismissed simply because the court deems the appeal to be for delay only. Both parties have a right to be heard. *Amory v. Amory*, 1 Otto, 356. Interest shall run only on the judgment, and not on the damages. *The Perseverance*, 3 Dall. 338. In admiralty cases damages are not allowed. *The Douro*, 3 Wall. 564; *The Santa Maria*, 10 Wheat. 431. See *Dzialynski v. Bank of Jacksonville*, 23 Fla. 46.

3. On appeal from decree.—The same rule shall be applied to decrees for the payment of money in cases in equity unless otherwise ordered by this court

Original Rule 62, promulgated December Term, 1851, 13 How. v. Original clause 2, 21 How. xiii. Amended December Term, 1870, see Revision of 1870.

4. In admiralty.—In cases in admiralty, damages and interest may be allowed if specially directed by the court.

Amendment promulgated March 10, 1890, 133 U. S. 711.

RULE 24. COSTS.

1. On dismissal.—In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

Original Rule 45, promulgated January Term, 1838, 12 Peters, vii. Revised December Term, 1858, 21 How. xiii.

Note.—If the record is printed under the supervision of the clerk, he may require the payment of the fee

chargeable under this rule, before the printing is done. *Bean v. Patterson*, 110 U. S. 401.

Costs on dismissal.—Costs are not allowed defendant on dismissal for want of jurisdiction. *Inglow v. Coolidge*, 2 Wheat. 363; *McIver v. Wattles*, 9 Wheat. 650; *Graham v. Strader*, 18 How. 602; *Brown v. Union Bank*, 4 How. 466. In such cases costs were allowed prior to this rule. *Winchester v. Jackson*, 3 Cranch, 514.

2. On affirmance.—In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

Original Rule 46, promulgated January Term, 1838, 12 Peters, vii; 21 How. xiii.

Costs on affirmance.—Costs will be allowed defendant on affirmance (*Walton v. U. S.* 9 Wheat. 658; *Campbell v. Gordon*, 6 Cranch, 183; *Clerke v. Harwood*, 3 Dall. 343), and may be single or double in discretion of court. Revised Statutes, § 1010, *ante*.

3. On reversal.—In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The costs of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

Original Rule 22, promulgated February Term, 1810, 1 Wheat. xviii; 1 Peters, ix. Rule 47, promulgated January Term, 1838, 12 Peters, vii. Amended December Term, 1851, 21 How. xiv. Amended April 18, 1864, 1 Wall. v.

Costs on reversal.—Where the lower court is ordered to enter judgment for plaintiff, it should enter judgment with costs (*McKnight v. Craig*, 6 Cranch, 187; *Bradstreet v. Potter*, 16 Peters, 317), but where the reversal is for want of jurisdiction, no costs are allowed plaintiff. *Montalet v. Murray*, 4 Cranch, 46.

4. United States exempt.—Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

Original Rule 48, promulgated January Term, 1838, 12 Peters, vii; 21 How. xiv.

Costs against United States.—No costs can be awarded against United States. *U. S. v. Hooe*, 3 Cranch, 73; *The Antelope*, 12 Wheat. 546; *U. S. v. Ringgold*, 3 Peters, 103; *U. S. v. McLemore*, 4 How. 286; *U. S. v. Boyd*, 5 How. 30. The United States never pay costs. *U. S. v. Barker*, 2 Wheat. 395.

5. Mandate.—In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

Original Rule 49, promulgated January Term, 1838, 12 Peters, vii; 21 How. xiv.

Mandate on dismissal.—The clerk will issue a mandate according to the decree (*Sibbald v. U. S.* 12 Peters, 492), and certify the decision to the lower court. *U. S. v. Fremont*, 8 How. 30. The mandate is the guide in executing the judgment (*West v. Brashear*, 14 Peters, 51), and the lower court is bound to follow the mandate and carry the decree into effect. *Skillern v. May*, 6 Cranch, C. C. 267; *Ex parte Story*, 12 Peters, 344; *Poultney v. Laffayette*, 12 Peters, 472; *Cutter v. Rae*, 7 How. 737. Where the mandate is ambiguous the decrees and opinions of this court and court below are to be taken into consideration. *The Santa Maria*, 10 Wheat. 431; *Mitchell v. U. S.* 15 Peters, 52. No appeal will lie from a decree entered in accordance with the mandate. *Stewart v. Salamon*, 7 Otto, 361; *Humphrey v. Baker*, 13 Otto, 736.

6. Costs to be inserted.—When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same bill of items taxed in detail

Original Rule 50, promulgated January Term, 1838, 12 Peters, vii; 21 How. xvi.

Costs generally.—In admiralty causes each party should bear his own costs. *Penhallow v. Doane*, 3 Dall. 54. In cases of original jurisdiction this court has power to award costs against either party. *Pennsylvania v. Wheeling Bridge*, 18 How. 460.

7. Fees of Clerk.—In the pursuance of the Act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:—

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio.

For making a manuscript copy of the record, when

required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every copy of an opinion of the court or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy.

New clause promulgated January 7, 1884.

Note.—The fees of the clerk shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

Promulgated March 28, 1887, 120 U. S. 785.

RULE 25. OPINIONS OF THE COURT.

1. **Recorded.**—All opinions delivered by the court shall immediately, upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter, as soon as the same shall be recorded.

Original Rule 41, promulgated March 14, 1834, 8 Peters, vii; 21 How. xiv.

Extent of.—The court will not deliver extended opinions in unimportant matters. *Tyler v. Campbell*, 16 Otto, 322. The court will usually announce their conclusions without reproducing the facts in the opinion. *Harrell v. Beall*, 17 Wall. 590.

2. **Preservation of.**—The original opinions of the court shall be filed with the clerk of this court for preservation.

Original Rule 41, promulgated March 14, 1834, 8 Peters, vii. Amended December Term, 1853, 21 How. xiv. Amended December Term, 1870, see Revision of 1870.

3. **Recording.**—Opinions printed under the supervision of the justices delivering the same need not be

copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

RULE 26. CALL AND ORDER OF THE DOCKET.

1. **On second day of term.**—The court on the second day in each term will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day, during the term, in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

Original Rule 35, promulgated March, 1830, 3 Peters, xvi; 21 How. xv. Revised December Term, 1870, see Revision of 1870.

Cause at foot of docket.—When a cause is sent to foot of docket it will not be reinstated to the inconvenience of other litigants. *Barry v. Mercein*, 4 How. 574.

2. **Ten causes each day.**—Ten causes only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

Original Rule 35, promulgated March, 1830; 3 Peters, xvi; 21 How. xv. Revised December Term, 1870, see Revision of 1870. Amendment promulgated May 13, 1889, 130 U. S. 706.

3. **Criminal cases.**—Criminal cases may be advanced, by leave of the court, on motion of either party.

Promulgated December Term, 1886, 4 Wall. vii.

Advancement of criminal cases.—Where the question is one which, for public convenience, should be immediately decided, cause will be advanced (*U. S. v. Norton*, 1 Otto, 558); if otherwise, and defendant is not in jail, cases will not be advanced except for good cause. *Ward v. Maryland*, 12 Wall. 163. See *Poin-dexter v. Greenhow*, 109 U. S. 63.

4. **Once Adjudicated.**—Cases once adjudicated by this court upon the merits, and again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

5. **Cases of general public interest.**—Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also, by leave of the court, be advanced on motion of the attorney-general.

6. **Motions to advance.**—All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

Original Rule, December Term, 1866, 4 Wall. vii. Amended May 3, 1875, 21 Wall. v.

Advancement of cases of public interest.—On a motion to advance a cause good reasons for so doing should be shown. *U. S. v. Norton*, 1 Otto, 558. Causes of public importance will not be advanced when similar causes are already assigned for remainder of term. *Barry v. Mercein*, 4 How. 574. Even revenue causes will not be advanced if government operations are not embarrassed by the delay. *Hoge v. Richmond R. R. Co.* 3 Otto, 1. Cases arising on municipal ordinances levying taxes are not revenue causes entitled to preference. *Davenport v. Dows*, 15 Wall. 390.

7. **Order to be preserved.**—No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances, to be shown to the court. Every case which shall have been called in its order and passed,

and put at the foot of the docket, shall, if not again reached during the term it was called, be continued to the next term of the court.

Original Rule 36, promulgated March, 1830, 3 Peters, xvii. Amended February 5, 1840, 14 Peters, xi: 21 How. xv. Revised and corrected December Term, 1870, see Revision of 1870, clause 5.

Advancing causes generally.— Causes not presenting questions entitling them to precedence will not be advanced (*Pennsylvania v. Wheeling etc. Co.* 11 How. 528), especially over the objection of one party thereto. *Louisiana v. New Orleans*, 13 Otto, 521. Between causes involving private interests only, one is not entitled to be advanced over others. *Sage v. C. P. R. R. Co.* 3 Otto, 412; *Miller v. State*, 13 Otto, 159. That a cause appear to have no merit, is no reason for advancement. *Amory v. Amory*, 1 Otto, 356.

8. Causes heard together.— Two or more cases involving the same question may, by the leave of the court, be heard together, but they must be argued as one case.

Promulgated December Term, 1866, 4 Wall. vii.

Hearing causes together.— Rule followed in *U. S. v. Booth*, 18 How. 476.

9. Reinstatement of cause.— If, after a case has been passed, under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call, ten cases after that under argument or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

Promulgated January 18, 1875, 20 Wall. xvii, clause 7.

10. How passed.— No stipulation to pass a case without placing it at the foot of the docket will be recognized as binding upon the court. A case can only be

so passed upon application made and leave granted in open court.

Promulgated January 18, 1875, 20 Wall. xvii, clause 7.

RULE 27. ADJOURNMENT.

Announcement.—The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon; and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment.

Original Rule 52, promulgated January Term, 1838, 12 Peters, viii. Rule 28 on revision of December Term, 1858, 21 How. xv.

RULE 28. DISMISSAL IN VACATION.

On written agreement.—Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in any appeal, shall, in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

Original Rule 64, promulgated December Term, 1857, 20 How. iv. Rule 29 of Revision of 1858, 21 How. xvi.

RULE 29. SUPERSEDEAS.

Bond of indemnity.—*Supersedeas* bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect and answer all damages and costs if he fail to make his plea good. Such indemnity,

where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including "just damages for delay," and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages; or where the property is in the custody of the marshal, under admiralty process, as in case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property and the costs of the suit and "just damages for delay," and costs and interest on the appeal.

Original Rule 32, promulgated December Term, 1867, 6 Wall. v

Supersedeas bonds.—Where it does not appear, it is presumed, until the contrary is proved, that a proper bond was taken (*Martin v. Hunter*, 1 Wheat. 304), and that it was sufficient. *French v. Shoemaker*, 12 Wall. 86. The security on such bond must be equal to the amount of decree, with damages and interest (*Stafford v. Union Bank*, 16 How. 135), and costs (*Seward v. Corneau*, 12 Otto, 161), and not solely enough to cover damages for delay. *Catlett v. Brodie*, 9 Wheat. 553; *The Wanata*, 5 Otto, 604. The amount of bond and sufficiency of security rests with the judge (*Jerome v. McCarter*, 21 Wall. 17), and his discretion will not be interfered with. *Ex parte Milwaukee R. R. Co.* 5 Wall. 188; *Dos Hermanos*, 10 Wheat. 306. But after the circuit judge has approved the bond and the appeal is transferred, any further order as to sufficiency of bond is void. *Draper v. Davis*, 12 Otto, 370; *Keyser v. Farr*, 15 Otto, 265. Where the circuit judge refuse to accept a bond, this court has power to accept it. *Sage v. R. R. Co.* 6 Otto, 712. If after acceptance security on a bond becomes bad, this court will make such order as justice requires. *Jerome v. McCarter*; 21 Wall. 17; *Martin v.*

Hazard Powder Co. 3 Otto, 302; *Williams v. Claflin*, 13 Otto, 753. Where approval of bond was obtained by fraud or perjury, *supersedeas* will be vacated and a new bond will not be received. *R. R. Co. v. Shutte*, 10 Otto, 644. The approval of the bond must be by the judge or justice (*National Bank v. Omaha*, 6 Otto, 737), either in court or out of court (*Hudgins v. Kemp*, 18 How. 531), but he cannot delegate such power to the clerk. *O'Reilly v. Edrington*, 6 Otto, 724. The bond must be given within ten days from rendering of decree. *Rubber Co. v. Goodyear*, 6 Wall. 153. As to proper language for a bond, see *Gay v. Parpart*, 11 Otto, 361. In suit for a specific delivery of railroad aid bond the bond will be fixed to cover coupons already due and to mature within four years with interest and damages. *Massachusetts etc. Co. v. Cherokee Tp.* 42 Fed. Rep. 750. A writ of error will not be quashed on the ground that the record was not filed until June, the writ being returnable to the January Term, as defendant in error under this rule had a right to docket and dismiss the case. *Pickett v. Legerwood*, 7 Peters, 144.

RULE 30. REHEARING.

Petition for.—A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

RULE 31. PRINTED RECORDS.

Form and size of.—All records, arguments, and briefs printed for the use of the court must be in such form and size that they can be conveniently bound together so as to make an ordinary octavo volume.

Promulgated December 1, 1879, 10 Otto, ix.

Note.—The court will not, according to the Rule 31, hear any cause without a complete copy of the

record having been brought up. *Keene v. Whittaker*, 13 Peters, 549.

RULE 32. WRITS OF ERROR AND APPEALS UNDER THE ACT OF FEBRUARY 25, 1889, CHAPTER 236.

Cases brought to this court by writ of error or appeal, under the Act of February 25, 1889, chapter 236, where the final judgment or decree rendered by the circuit court does not exceed the sum of five thousand dollars, will be advanced on motion, and heard under the rules prescribed by Rule 6 in regard to motions to dismiss writs of error and appeals.

Promulgated March 10, 1890, 133 U. S. 711. See *ante*, Rules 9, 10.

A writ of error to a State court which had refused to grant a motion to remove may be advanced as within the spirit, although not within the letter, of Rule 32, regarding advancement of causes remanded by the circuit court. *Burlington C. R. & N. R. Co. v. Dunn*, 121 U. S. 182. See *Poindexter v. Greenhow*, 109 U. S. 63; *Louisiana v. New Orleans*, 103 U. S. 306; *U. S. v. Norton*, 91 U. S. 558; *Ward v. Maryland*, 12 Wall. 163; *Call v. Palmer*, 106 U. S. 39; *Flecher v. Hamlet*, 116 U. S. 408.

RULE 33. MODELS, DIAGRAMS, EXHIBITS.

1. **Models and exhibits.**—Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

Promulgated November 23, 1885, 115 U. S. 701.

2. **Disposition of.**—All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this

rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

Promulgated January 7, 1884, and November 23, 1885, 115 U. S. 701.

RULE 34. CUSTODY OF PRISONERS.

1. Writ of habeas corpus.—Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

Note.—This rule does not make the decision of the circuit judge as judge, a decision of the court. *Carper v. Fitzgerald*, 121 U. S. 87.

2. Detention of prisoner.—Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Appearance.—Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

Promulgated March 29, 1886, and as amended May 10, 1886, 117 U. S. 708.

RULE 35. ASSIGNMENT OF ERRORS.

1. Where an appeal or writ of error is taken from a district court or a circuit court direct to this court, under section 5 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3,

1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to, *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of sections 2, 3, 4, 5, 6, and 9 of Rule 10.

Promulgated May 11, 1891, 139 U. S. 705.

RULE 36. APPEALS AND WRITS OF ERROR.

1. An appeal or a writ of error from a circuit court or a district court direct to this court, in the cases provided for in sections 5 and 6 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security to be taken and the citations signed by him, and he may also grant a *super-*

sedes and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said sections 5 and 6, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

Promulgated May 11, 1891, 139 U. S. 706

RULE 37. CASES FROM CIRCUIT COURT OF APPEALS.

1. Where under section 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

3. Where application is made to this court under section 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant, as part of the application.

Promulgated May 11, 1891, 139 U. S. 706.

RULE 38. INTEREST, COSTS, AND FEES.

The provisions of Rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of sections 5 and 6 of the said act.

Promulgated May 11, 1891, 139 U. S. 707.

ORDER

IN REFERENCE TO

APPEALS FROM THE COURT OF CLAIMS.

Regulations prescribed by the Supreme Court of the United States, under which appeals may be taken from the court of claims to said Supreme Court.

RULE 1.

Record on appeal.—In all cases hereafter decided in the court of claims, in which, by the act of Congress such appeals are allowable, they shall be heard in the supreme court upon the following record, and none other:—

I. TRANSCRIPT.—A transcript of the pleadings in the case of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

II. STATEMENT OF FACTS AND CONCLUSIONS OF LAW.—A finding by the court of claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or

decrees. The finding of facts and conclusions of law to be certified to this court as a part of the record.

Original Rule, promulgated December Term, 1865, 3 Wall. vii. Clause 2 amended December Term, 1872, 17 Wall. xvii.

Record, how prepared.—The findings should be prepared with all the fullness and perspicuity of a special verdict (*Burr v. Des Moines Co.* 1 Wall. 102), and are conclusive unless impeached for some error of law appearing on the record. *U. S. v. Smith*, 94 U. S. 214. The court of claims should not send up the evidence even though the parties agree thereto (*Hubbell v. U. S.* 6 Ct. of Cl. 53); but if it is sent here, and from it there appears no legal ground for the establishment of the facts found, judgment will be reversed. *U. S. v. Clark*, 6 Otto, 37. Only such acts should be brought here as will enable this court to properly decide the questions of law ruled on below. *De Groot v. U. S.* 5 Wall. 419; *U. S. v. Pugh*, 9 Otto, 265. That the record is not properly prepared does not warrant a dismissal, but record will be remanded for correction. *U. S. v. Johnson*, 6 Wall. 101; *Wilcox v. U. S.* 6 Ct. of Cl. 77; *U. S. v. Clark*, 4 Otto, 73.

RULE 2.

Appeal, how taken.—In all cases in which judgments or decrees have heretofore been rendered, where either party is by law entitled to an appeal, the party desiring it shall make application to the court of claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its rulings, judgment, or decree in the case. The court shall, if the specification of alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as, in the judgment of said court, shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule 1 (except the statement of facts and law

therein mentioned) shall constitute the record on which those cases shall be heard in the supreme court.

Promulgated December Term, 1865, 3 Wall. vii.

RULE 3.

Order of allowance, limitation.—In all cases an order of allowance of appeal by the court of claims, or the chief justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

Promulgated December Term, 1865, 3 Wall. viii.

Allowance of appeal.—The allowance of an appeal does not absolutely divest the court of claims of jurisdiction. *Ex parte Roberts*, 15 Wall. 384. That court may revoke the allowance while the record is still in its possession. *Ex parte Roberts*, 15 Wall. 384.

RULE 4.

Findings to be filed.—In all cases in which either party is entitled to appeal to the supreme court, the court of claims shall make and file their finding of facts and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case.

Promulgated December Term, 1869, 9 Wall. vii.

RULE 5.

Request for findings.—In every such case, each party, at such time, before trial and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven, and deems material to the due presentation of the case in the findings of fact.

Original Rule promulgated December Term, 1869, 9 Wall. vii.
Amended January 29, 1879, 7 Otto, viii.

Findings.—If the court of claims refuse to find a material fact, the proper remedy is to take an exception, which will then be reviewed on appeal (*U. S. v. Adams*, 9 Wall. 661; *Lawrence v. U. S.* 8 Ct. of Cl. 252), and if the finding is material, the case will be sent back with directions to find such fact (*Mahan v. U. S.* 14 Wall. 109), but the appellate court will not direct the lower court what to find, nor how to find it. *U. S. v. Adams*, 9 Wall. 661. In making its findings the court will set out only facts established by the evidence (*Roche v. District Columbia*, 18 Ct. of Cl. 289; *Power v. U. S.* 18 Ct. of Cl. 493; *Harvey v. U. S.* 18 Ct. of Cl. 470), and those facts always separately from the conclusions of law. *Harvey v. U. S.* 18 Ct. of Cl. 570; *Gallagher v. District Columbia*, 18 Ct. of Cl. 705.

RULES

OF THE

CIRCUIT COURT OF APPEALS.

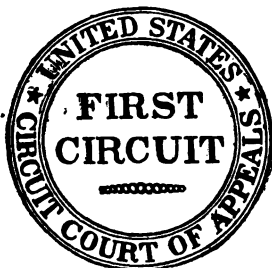
RULE 1. NAME.

The court adopts "United States Circuit Court of Appeals for the ——¹ Circuit" as the title of the court.

¹ Blank to be filled out by the number of the circuit in which the court is held.

RULE 2. SEAL.

The seal shall contain the words "United States" on the upper part of the outer edge, and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right, and the words "——¹ Circuit" in two lines, in the center with a dash beneath,



¹ Blank to be filled by number of the circuit.

RULE 3. TERMS.

One term of this court shall be held annually at the city of _____¹ on the _____² of _____³, and shall be adjourned to such times and places as the court may from time to time designate.

1 Name of city where court is to be held in the district is to be inserted.

2-3 Insert here the date on which the term is to be held, as follows:—

First Circuit—"At the city of Boston on the first Tuesday of October."

Second Circuit—"At the city of New York on the last Tuesday of October."

Third Circuit—"The terms of the court will commence and be held on the third Tuesday of March, and the third Tuesday of September in each year, except the present term, at the city of Philadelphia."

Fourth Circuit—"At the city of Richmond," the time to be fixed at its first regular session.

Fifth Circuit—"At the city of New Orleans on the third Monday of November."

Sixth Circuit—"At the city of Cincinnati on the first Monday of October."

Seventh Circuit—"A term of this court shall be held annually at the city of Chicago on the first Monday in October, and continue until the first Monday in October of the succeeding year. Each term shall be adjourned to such times and places as the court may from time to time designate." The first regular term to commence on the first Monday in October, 1891.

Eighth Circuit—"At the city of St. Louis on the second Monday of October."

Ninth Circuit—"At the city of San Francisco on the first Monday of October."

RULE 4. QUORUM.

1. If at any term a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any

suit, proceeding, or process, depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

RULE 5. CLERK.

1. The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.¹

2. The clerk shall not practice, either as attorney or counselor, in this court, or in any other court, while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and shall give bond in a sum to be fixed,² and with sureties to be approved, by the court, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court-room or from the office without an order from the court.

1 *Fifth Circuit*—"The clerk's office shall be kept at the city of New Orleans."

2 Sum in the fifth circuit fixed at \$ 10000.

RULE 6. MARSHAL, CRIER, AND OTHER OFFICERS.

1. Every marshal and deputy marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by section 782 of the Revised Statutes, and the marshal shall, before he enters on the duties of his office, give bond in a sum to be fixed,¹ and with sureties to be approved, by the court, for the faith-

1 In the fifth circuit fixed at \$10000.

ful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

2. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

RULE 7. ATTORNEYS AND COUNSELORS.

All attorneys and counselors admitted to practice in the supreme court of the United States, or in any circuit court of the United States, shall become attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the supreme court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

Third Circuit, add the words: "And all attorneys and counselors of the circuit court of the United States, for the third circuit, shall be attorneys and counselors of this court without taking any further oath."

Sixth Circuit, add the words: "A certificate of such admission, if demanded, shall be furnished upon the payment of a clerk's fee of two dollars and fifty cents."

Eighth Circuit, reads as follows: "All attorneys and counselors admitted to practice in the supreme court of the United States, or in any circuit court of the United States, or in the supreme court of any State in this circuit, may, upon motion of some member of the bar of this court, be admitted as attorneys and counselors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the supreme court of the United States, and on subscribing the roll; but no fee shall be charged therefor."

Ninth Circuit, reads as follows: "All attorneys admitted to practice in the supreme court of the United States, or in any circuit court of the ninth circuit, shall be deemed attorneys of the circuit court of appeals for the ninth circuit; but such attorneys, on or before their first appearance in open court in said court, shall take an oath or affirmation in the form prescribed by Rule 2 of the supreme court of the United States, and subscribe the roll of attorneys. All other persons who have been admitted to practice in the highest court of any State or Territory, upon presenting satisfactory evidence of good moral character and fair professional standing, may be admitted to practice in said court, upon taking the oath so prescribed, and subscribing the roll of attorneys."

RULE 8. PRACTICE.

The practice shall be the same as in the supreme

court of the United States, as far the same shall be applicable.

RULE 9. PROCESS.

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the supreme court.

RULE 10. BILL OF EXCEPTIONS.

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

RULE 11. ASSIGNMENT OF ERRORS.

The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of error which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript

of the record and be printed with it. When this is not done, counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

RULE 12. OBJECTIONS TO EVIDENCE IN THE RECORD.

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

RULE 13. SUPERSEDEAS AND COSTS BONDS.

1. *Supersedeas* bonds in the circuit and district courts must be taken with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but, in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party, in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

RULE 14. WRITS OF ERROR, APPEALS, RETURN, AND RECORD.

1. The clerk of the court to which any writ of error may be directed¹ shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

¹ *Third Circuit*.—Insert the words "upon being paid or tendered his fees therefor."

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days² from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day.

6. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty Rule 52 of the supreme court.

RULE 15. TRANSLATIONS.

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding, in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

RULE 16. DOCKETING CASES.

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. But for good cause shown the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the

² *Eighth Circuit*—Substitute the word "sixty" for "thirty."

court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument at the term.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

RULE 17. DOCKET.

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

RULE 18. CERTIORARI.

No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other

party, be verified by affidavit. And all motions for such *certiorari* must be made at the first term of the entry of the case; otherwise the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

RULE 19. DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and, if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and, if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: *provided*, however, that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court from any final judgment or decree rendered in the circuit or district

court, and, at the time of suing out such writ of error or appeal, the other party to the suit shall be dead, and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And, within thirty days after the filing of the record in this court, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or district in which such representative resides; and, upon such suggestion, he may on motion obtain an order that, unless such representative shall make himself a party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: *provided*, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: *provided*, also,

that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: and *provided*, also, that the said representative may at any time, before or after said suggestion, come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

RULE 20. DISMISSING CASES.

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

RULE 21. MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

RULE 22. PARTIES NOT READY.

1. Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed.

2. Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the right of the case.

3. When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

RULE 23. PRINTING RECORDS.

The counsel for the plaintiff in error or appellant shall print and file with the clerk of the court, at least six days before the case is called for argument, twenty copies of the record, unless a different order as to such printing is made by the court, either of its own motion, or upon application made at least ten days before the case is called for argument; and shall furnish three copies of the printed record to the adverse party, at least six days before the argument. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. If the record shall not have been printed when the case is reached in the regular call of the docket, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

Eighth Circuit.—On the filing of the transcript in every case the clerk shall forthwith cause the same to be printed, and shall furnish three copies of the printed record to each party at least thirty days before the argument. The parties may stipulate in writing

that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

RULE 24. BRIEFS.

1. The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least six¹ days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in order here stated: (1) A concise abstract or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised. (2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report, and the action of the court upon it. (3) A brief of the argument, exhibiting a clear statement of the points of law or fact to

¹ *Eighth Circuit* — The word "twenty" substituted for "six."

be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and, when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

RULE 25. ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the

court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion, *provided*, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

**RULE 26. FORM OF PRINTED RECORDS, ARGUMENTS,
AND BRIEFS.**

All records, arguments, and briefs printed for the use of the court must be in such form and size that they can be conveniently bound together so as to make an ordinary octavo volume.

RULE 27. COPIES OF RECORDS AND BRIEFS.

The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, and arguments filed therein.

RULE 28. OPINIONS OF THE COURT.

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be

bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

Third Circuit—Substitute as follows: (1) All written opinions delivered by the court shall be delivered to the clerk and recorded. (2) Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

Sixth Circuit—In the sixth circuit section 3 is omitted.

RULE 29. REHEARING.

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

RULE 30. INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interests may be allowed, if specially directed by the court.

RULE 31. COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction,¹ costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgement or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party, but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the supreme court or removed thereto by *certiorari* or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the supreme court.

RULE 32. MANDATE.

In all cases finally determined in this court, a man-

¹ *Eighth Circuit*— In this circuit this clause is omitted: "Except where the dismissal shall be for want of jurisdiction."

date or other proper process in the nature of a *procedendo*, shall be issued, on the order of this court to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

RULE 33. CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

RULE 34. MODELS, DIAGRAMS, AND EXHIBITS OF MATERIAL.

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

2. All models, diagrams, and exhibits of material placed in the custody of the marshal for the inspection

of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

RULES OF PRACTICE

FOR THE

COURTS OF EQUITY OF THE UNITED STATES.

Rules promulgated February Term, 1822, 7 Wheat. v. Superseded by rules promulgated March, 1842, 17 Peters, lxi. Abrogated by Rules of Supreme Court, Edition of 1866.

RULE 1. PRELIMINARY REGULATIONS.

Court, when open.—The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings, for issuing and returning mense and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits.

RULE 2.

Clerk's office.—The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing all motions, rules, orders, and other proceedings, which are grantable of course, and applied for, or had by the parties, or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

RULE 3.

Orders, rules, etc.—Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary at the next rule day thereafter, unless some other time is assigned by the judge for the hearing.

Orders, etc., in term.—No formal notice is required of orders or motions made in term, in presence of counsel. *McLean v. Lafayette Bank*, 3 McLean, 503.

RULE 4.

Entry of motions, rules, and orders.—All motions, rules, orders, and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order book, touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent,

in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

Notice of motion.—Motions grantable of course do not require notice other than entry in the order book. *U. S. v. Parrott*, 1 McAll. 455; *Bronson v. Kensey*, 3 McLean, 180; *Halderman v. Halderman*, Hemp. 407. Motions which must be allowed by the court or judge require in addition a special notice. *U. S. v. Parrott*, 1 McAll. 455; *Wilkins v. Jordan*, 3 Wash. 226; *Bennett v. Hoefner*, 17 Blatchf. 341; *Bronson v. Kensey*, 3 McLean, 180; *Gray v. Chicago etc. Co.* 1 Woolw. 63. Wherever the entry is not made in the order book, the party has not notice. *Newby v. Oregon etc. R. R. Co.* 1 Sawy. 63.

RULE 5.

Motion for process, etc., as of course.—All motions and applications in the clerk's office for the issuing of mense process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions, and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

Clerk's allowance, conditional.—The clerk's allowance of a motion may be suspended or altered by the judge, as justice may require. *Poultney v. Lafayette*, 12 Peters, 472.

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Clerk's allowance, conditional.—The clerk's allowance of a motion may be suspended or altered by the judge, as justice may require. *Poultney v. Lafayette*, 12 Peters, 472.

RULE 6.

Motions and orders not grantable of course.—All motions for rules or orders and other proceedings, which are not grantable of course, or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule day, and entered in the order book, and shall be heard at the rule day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused in his discretion.

Motions, etc., not grantable of course.—Motions and orders which require allowance by the judge or special notice to adverse party are not grantable of course. *U. S. v. Parrott*, 1 McAll. 477.

PROCESS.

RULE 7.

Compulsory process.—The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

Process, issuance of.—Process in the circuit courts can only be issued within the limits of their respective districts (*Herndon v. Ridgway*, 17 How. 424); and against a person not an inhabitant of or found in the district process will not issue (*Picquet v. Swan*, 5 Mason, 35);

therefore the attachment of property to compel appearance can only be used where persons are amenable to the process of these courts. *Toland v. Sprague*, 12 Peters, 300; *Nazro v. Cragin*, 3 Dill. 474; *Picquet v. Swan*, 5 Mason, 35; *Ex parte Graham*, 3 Wash. C. C. 456.

RULE 8.

Final process.—Final process to execute any decree may, if the decree be solely for the payment of money, be by writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds, or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound without further service to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

Final process.—Final process cannot be served outside of the district, except in another district in the same State; or where in favor of the United States, in any part of the United States. Revised Statutes, §§ 985, 986, *ante*; *Toland v. Sprague*, 12 Peters, 300. A discharge will not be granted under an execution until full and exact compliance with the decree. *Gwin v. Breedlove*,

2 How. 29; *Griffin v. Thompson*, 2 How. 245; *McFarland v. Gwin*, 3 How. 720.

RULE 9.

Writ of assistance.—When any decree or order is for the delivery of possession upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.

Process, writ of assistance.—The writ of assistance is an appropriate process against parties bound by decree who refuse to surrender possession. *Terrell v. Allison*, 21 Wall. 289; *Pratt v. Burr*, 5 Biss. 36. The power to act under this writ extends only to parties to suit and those coming in under them after suit commenced. *Thompson v. Smith*, 1 Dill. 458.

RULE 10.

Parties, how affected.—Every person not being a party in any cause who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party in the cause.

SERVICE OF PROCESS.

RULE 11.

Subpoena, when to issue.—No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

RULE 12.

When returnable.—Whenever a bill is filed the clerk shall issue the process of subpoena thereon, as of course,

upon the application of the plaintiff, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.

Subpoena, when returnable.—Subpoena must be made returnable at least twenty days after it is served or it is irregular. *Treadwell v. Cleveland*, 3 McLean, 283.

RULE 13.

Service, how made.—The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same, to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.

Amended May 3, 1872, 21 Wall. v.

Subpoena, service of.—Service of subpoena should be strictly according to the rule. *Hyslop v. Hoppock*, 5 Ben. 553. These courts have no means of effecting constructive service (*Parsons v. Howard*, 2 Woods, 1; *Reid v. Rochereau*, 2 Woods, 145); such service would not give these courts jurisdiction. *Hyslop v. Hoppock*, 5 Ben. 553. But where the court has jurisdiction of the parties, it may acquire jurisdiction of the subject-matter by substituted service (*Hintz v. Suckley*, 2 Wash. C. C. 465; *Segee v. Thomas*, 3 Blatchf. 11), on the attorney of the adverse party. *Read v. Consequa*, 4 Wash. C. C. 174. Such service is only good in cases of injunction to stay proceedings at law, and in cross suits in equity,

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and then only on the attorney of adverse party in such proceedings. *Eckert v. Bauert*, 4 Wash. C. C. 370; *Ward v. Seabry*, 4 Wash. C. C. 426; *Ward v. Seabring*, 4 Wash. C. C. 472; *Doe v. Johnston*, 2 McLean, 322; *Dunn v. Clark*, 8 Peters, 1; *Lowenstein v. Glidewell*, 9 Blatchf. 324. Such service is only allowed after application and order therefor (*Pac. R. R. Co. v. Mo. Ry. Co.* 1 McCrary, 647), on proof that it is impossible within a reasonable time to make actual or personal service. *Bronson v. Keokuk*, 2 Woods, 498. Service on the husband alone would have been good service on both husband and wife prior to amendment of rule. *Robinson v. Cathcart*, 2 Cranch C. C. 590. Service may now be made by leaving at place of abode with adult member of family. *O'Hara v. McConnell*, 3 Otto, 151; *Phoenix M. I. Co. v. Wulf*, 9 Biss. 285. No subpoena can be served out of the district for which it is issued. *Jobbins v. Montague*, 5 Ben. 429. Appearance without exception waives all irregularity in the service of subpoena. *Gracie v. Palmer*, 8 Wheat. 299; *Thayer v. Wales*, 5 Dill. 325. A general notice to persons to appear is not a subpoena. *Young v. Montgomery etc. Co.* 2 Woods, 607. See *Kohn v. Ryan*, 31 Fed. Rep. 636.

RULE 14.

Alias subpoena.—Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties quoties* against such defendant, if he shall require it, until due service is made.

RULE 15.

Who to make service.—The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

Service, how and by whom made.—Process should be served by the marshal or his regular deputy (U. S. v.

Montgomery, 2 Dall. 335), or by a deputy specially appointed by him (*Hyman v. Chales*, 12 Fed. Rep. 855), or by some other person specially appointed by the court (*Jobbins v. Montague*, 5 Ben. 429), as soon as can reasonably be done. *Kennedy v. Brent*, 6 Cranch, 187. The marshal will exercise his judgment and make his return at his peril (*Wortman v. Coyningham*, 1 Peters C. C. 241), and he is liable for any injury arising through failure to properly perform this duty on his own part (*Life & F. Ins. Co. v. Adams*, 9 Peters, 573; *Harriman v. Rockaway B. P. Co.* 5 Fed. Rep. 461), or through failure of his deputy. *U. S. v. Moore*, 2 Brock. 317.

RULE 16.

Entry on docket on return.—Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

RULE 17.

Day of.—The appearance day of the defendant shall be the rule day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable.

Entry of.—The appearance of the defendant, either personally or by his solicitor, shall be entered in the order book on the day thereof by the clerk.

Time of—Effect of.—Defendant must usually appear within the time limited (*Treadwell v. Cleveland*, 3 McLean, 283), but further time will be granted when injustice will follow a refusal to do so. *Poulney v. Lafayette*, 12 Peters, 472. Defendants may waive process and appear, and are then bound as if regularly served. *Nelson v. Moon*, 3 McLean, 319; *Carrington v. Brent*, 1 McLean, 167. Regularity of service is admitted by appearance without exception in person (*Gracie v. Palmer*, 8

Wheat. 699; *Goodyear v. Chaffee*, 3 Blatchf. 268; *Marye v. Strouse*, 5 Fed. Rep. 494, or by attorney. *Knox v. Summers*, 3 Cranch, 496. Having appeared, defendant cannot complain that bill contains no prayer for process. *Segee v. Thomas*, 3 Blatchf. 11. Appearing for purpose of moving to dismiss for want of jurisdiction is a voluntary appearance (*Jones v. Andrews*, 10 Wall. 327), but appearing for purpose of moving to strike case from docket because no process had been served does not waive service. *Dore v. Gibbonney*, 3 Hughes, 382. Appearance after service by a fictitious name is not binding, nor does it make such person a party. *Kantuck etc. Co. v. Day*, 2 Sawy. 468. But appearance of a corporation by fictitious name is good, being an admission that such is its name. *Virginia etc. Co. v. U. S., Taney*, 418. Where an appearance is unauthorized, the party is not bound by it (*Shelton v. Tiffin*, 6 How. 163), but it is not necessary that the authority should appear on the record. *Osborne v. U. S. Bank*, 9 Wheat. 739.

BILLS TAKEN PRO CONFESSO.

RULE 18.

Default.—It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office, on the rule day next succeeding that of entering his appearance. In default thereof the plaintiff may, at his election, enter an order (as of course) in the order book that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant, to compel

an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.

Amended October 28, 1878, 7 Otto, viii.

Default.—A bill cannot be taken for confessed when at same time defendant appears and tenders his answer (*Halderman v. Halderman*, Hemp. 407); but the court may impose such terms on defendant as are just. *Halderman v. Halderman*, Hemp. 407. A final decree for want of appearance cannot be rendered at the first term after service of subpoena, unless another rule day has intervened. *O'Hara v. McConnell*, 93 U. S. 150.

RULE 19.

Decree on default.—When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall at the same term set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.

Amended October 28, 1878, 7 Otto, viii.

Decree.—A decree under this rule is merely *nisi*, and will not be made absolute until succeeding term of court. *Pendleton v. Evans*, 4 Wash. C. C. 336; *Boudi-*

not *v. Symmes*, Wall. C. C. 139; *O'Hara v. McConnell*, 3 Otto, 150. A default will usually be set aside, on motion, on condition that defendant plead to the merits and go to trial. *Kemball v. Stewart*, 1 McLean, 332. When irregularly entered default will be set aside on motion. *Fellows v. Hall*, 3 McLean, 281. Where defendant has appeared notice should be given of application for final decree after order *pro confesso*. *Bennett v. Hoefner*, 17 Blatchf. 341.

FRAME OF BILLS.

RULE 20.

Introductory part.—Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says, that," etc.

Contents of, how set out.—The introductory part of the bill must give with certainty the names of all the parties. *Barth v. MaKeever*, 4 Biss. 206. The use of fictitious names is not naming a party within the rule. *Kentucky S. M. Co. v. Day*, 2 Sawy. 468. But in a suit against an inanimate object the name thereof will be sufficient. *Str. Shark v. Lee Choi Chum*, 1 Sawy. 717. Domicile should be averred so that it can be put in issue. *Harrison v. Nixon*, 9 Peters, 483, 505. The citizenship of every necessary party should be distinctly stated, and it must be shown that plaintiffs and defendants are citizens of different States. *Speigle v. Meredith*, 4 Biss. 120; *Merserole v. Union P. C. Co.* 6 Blatchf. 356; *National Bank v. Baack*, 8 Blatchf. 137; *Dodge v. Perkins*, 4 Mason, 435; *Findlay v. U. S. Bank*, 2 McLean, 44; *Vose v. Philbrook*, 3 Story, 336. These matters should all be stated in the introductory part of the bill; it is

not sufficient to state them in the caption only. *Jackson v. Ashton*, 8 Peters, 148. A bill "to the circuit court in chancery sitting" is sufficiently addressed. *Sterrick v. Pagsley*, 1 Flipp, 250.

RULE 21.

What to omit and what to state.—The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant, by way of defense or excuse, to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno* or any other special order pending the suit, is required, it shall also be specially asked for.

Contents of bill proper.—The bill must contain on its face sufficient matter to maintain case of plaintiff (*Harrison v. Nixon*, 9 Peters, 483), but a general statement of the facts is sufficient; it is not necessary to set out all the *minutta*. *Dunham v. Railway Co.* 1 Bond, 442. There should be a prayer for general relief, and under it other relief consistent with the case made out may be granted. *English v. Foxall*, 2 Peters, 595; *Walden v.*

Bodley, 14 Peters, 156; Hobson v. McArthur, 16 Peters, 182. Under such prayer damages may be allowed (Penhallow v. Doane, 3 Dall. 86) or specific performance ordered (Taylor v. Merchants' F. I. Co. 9 How. 490); but relief entirely inconsistent with that prayed for will not be granted. Wilson v. Graham, 4 Wash. C. C. 53. Though not entitled to relief prayed for, other relief may be granted under the general prayer. Moore v. Mitchell, 2 Woods, 483. The writ of *ne exeat* pending the suit must be specially prayed for. Lewis v. Shainwald, 7 Sawy. 403.

RULE 22.

Parties out of jurisdiction.—If any person, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

Absence of necessary parties.—Where necessary parties are out of the jurisdiction it should so appear on the pleadings. Tobin v. Walkinshaw, 1 McAll. 23.

RULE 23.

Prayer for process.—The prayer or process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the

prayer for relief, that shall be sufficient without repeating the same in the prayer for process.

RULE 24.

Signature of counsel.— Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

Signature of counsel.— Unless signed by counsel, the bill is demurrable. But signing on the back is sufficient. *Dwight v. Humphrey*, 3 McLean, 104. Signing as "solicitor" is sufficient, and as proper as signing "of counsel." *Stinson v. Hildrup*, 8 Biss. 376. Being ordered off the files, the bill may be signed, and on motion restored. *Roach v. Hulings*, 5 Cranch C. C. 637.

RULE 25.

Taxable costs.— In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

RULE 26.

Surplusage.— Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may on exceptions

be referred to a master by any judge of the court for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

Impertinence.—Impertinences are matters not pertinent or relevant to the points properly before the court for decision (*Wood v. Mann*, 1 St. n. 578), or such matters as are stated with needless prolixity. *Chapman v. School District*, Deady, 108. Matter which is entirely immaterial is impertinent, and should be expunged. *Langdon v. Goddard*, 3 Story, 13. Where exceptions are taken for impertinence, the pleading will be given a liberal construction. *Griswold v. Hill*, 1 Paine, 390.

RULE 27.

Exceptions, how taken.—No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule day, or the master shall certify that further time is necessary for him to complete the examination.

Allowance of exception.—An exception taken for im-

pertinence must be allowed in whole or not at all. *Chapman v. School District, Deady, 108.*

AMENDMENT OF BILLS.

RULE 28.

As of course.—The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill in any matter whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filing blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea, or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.

Amendments of bills.—Amendments are only allowed where the bill is defective in parties, the prayer, or in omission of some fact connected with the substance of the case. *Shields v. Barrow, 17 How. 130.* To insert a wholly different case is not properly an amendment. *Shields v. Barrow, 17 How. 130; Goodyear v. Bourn, 3 Blatchf. 266.* Certain amendments will be permitted at any stage of the case, as to bring in an essential party (*Walden v. Bodley, 14 Peters, 156; Shields v. Barrow, 17 How. 130; Harrison v. Rowan, 4 Wash. 202*), or to aver citizenship (*Fisher v. Rutherford, Bald. 188; Hilliard v. Brevoort, 4 McLean, 25*); but amendments which change the character of the bill should rarely be admitted after the case is set for hearing. *Walden v. Bodley, 14 Peters,*

156. New matter which accrued since filing original bill cannot be introduced by amendment, but only by supplemental bill. *Copen v. Flesher*, 1 Bond, 440; *Swatzel v. Arnold*, Woolw. 383. Amending a bill on which an injunction was granted does not usually affect the injunction. *Read v. Consequa*, 4 Wash. C. C. 175. Process need not be issued on an amended bill against defendants who are in court, and therefore have notice. *Longworth v. Taylor*, 1 McLean, 514. Proper procedure is to file an amended bill, and not to interline original bill. *Pierce v. West*, 3 Wash. C. C. 355. Such amended bill should state no more of the original bill than may be necessary to make intelligible the amendments. *Pierce v. West*, 3 Wash. C. C. 355.

RULE 29.

By order of court.—After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

Amendment after answer.—Matter which could not sooner have been introduced may be allowed by amendment after replication (*Wharton v. Lowrey*, 3 Dall. 264); but where it could have been done sooner, even in small matters, the amendment will not be allowed. *Ross v. Carpenter*, 6 McLean, 382; *Clifford v. Coleman*,

13 Blatchf. 210. If after replication amended bill be filed without leave, it will on motion be stricken from the files. *Washington R. R. Co. v. Brasley*, 10 Wall. 299. Where demurrer to bill is sustained, if justice require it this court may allow an amendment (*Hunt v. Rousmaniere's Admr.* 2 Mason, 342); but where a case has been dismissed for want of jurisdiction the bill cannot be amended nor cause restored. *Jackson v. Ashton*, 10 Peters, 480. This court has power, even after hearing, where a cause for relief is made out, but not that shown in the bill to allow amendments so as to do substantial justice. *Neale v. Neales*, 9 Wall. 1; *The Tremolo Patent*, 23 Wall. 518; *Battle v. Mutual L. I. Co.* 10 Blatchf. 418. Amendments regularly made cannot be avoided by a motion to set them aside. *Lichtenaur v. Cheney*, 3 McCrary, 119.

RULE 30.

Order, when abandoned.—If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk's office, on or before the next succeeding rule day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

DEMURRERS AND PLEAS.

RULE 31.

When allowed.—No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and if a plea, that it is true in point of fact.

Certificate of counsel, affidavit, etc.—Where pleas are not accompanied by the proper certificate and affidavit, they should be disregarded (*National Bank v. Insurance Co.* 14 Otto, 55, 76; *Secor v. Singleton*, 3 McCrary, 692; *Filer*

v. Levy, 17 Fed. Rep. 610); but if plaintiff instead of disregarding it demur to it, he waives the certificate and affidavit. *Goodyear v. Toby*, 6 Blatchf. 130.

RULE 32.

With leave of court.—The defendant may, at any time before the bill is taken for confessed, or afterwards with the leave of the court demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and explicitly denying the fraud and combination, and the facts on which the charge is founded.

Allowance of.—Defendant may meet plaintiff's bill either by demurrer, plea, or answer (*Livingston v. Story*, 9 Peters, 632), at any time before the bill is taken for confessed. *Oliver v. Decatur*, 4 Cranch C. C. 458. A demurrer to the whole bill must be overruled if any part of it is sufficient. *Atwill v. Ferrett*, 2 Blatchf. 39; *Heath v. Erie R. R. Co.* 8 Blatchf. 348; *Brandon Co. v. Prime*, 14 Blatchf. 371; *Perry v. Littlefield*, 17 Blatchf. 273; *Livingston v. Story*, 9 Peters, 632. A demurrer in part followed by an answer to rest is proper and allowable. *Pierpont v. Fowle*, 2 Wood. & M. 23; *Crescent City Co. v. Butchers' etc. Co.* 12 Fed. Rep. 225. Where the demurrer or plea and answer is to the same matter, defendant may be compelled to elect by which he will abide. *Hayes v. Dayton*, 18 Blatchf. 420. A demurrer that the plea is defective in not responding to all allegation in the bill is not good, for a plea may be to the whole bill or to part only (*Beard v. Bowler*, 2 Bond, 13); a plea may also be good in part and bad in part. *Wythe v. Palmer*, 3 Sawy. 412; *Kirkpatrick v. White*, 4 Wash. C. C. 595. Defendant cannot as a matter of right file more than one plea (*Wheeler v. McCormick*, 8 Blatchf. 267; *Lamb v. Starr*, Deady, 351), but when justice or necessity require it, court may allow several pleas. *Noyes v. Willard*, 1 Woods, 187. Where several pleas

are filed without leave, defendant must elect by which he will stand. *Noyes v. Willard*, 1 Woods, 187. Fraud alleged in the bill must be denied as well where a plea is entered as when an answer is filed. *Lewis v. Baird*, 3 McLean, 56; *Burnley v. Jeffersonville*, 3 McLean, 336; *Shelton v. Tiffin*, 6 How. 163; *House v. Mullen*, 22 Wall. 42.

RULE 33.

Argument on plea.—The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

Plea, argument on—Replication to.—If plea is in proper form, plaintiff should either set it down for argument or reply, and take issue on it. *Rhode Island v. Massachusetts*, 14 Peters, 210. Where, without reply, plaintiff set down the plea for argument, all the facts well pleaded are considered as admitted (*Mellus v. Thompson*, 1 Cliff. 125; *Parton v. Prang*, 3 Cliff. 537; *S. C. 2 Off. Pat. Gaz.* 619; *Gallagher v. Roberts*, 1 Wash. C. C. 320); plaintiff merely denying their legal sufficiency to prevent a recovery. *Rhode Island v. Massachusetts*, 14 Peters, 210. If plaintiff instead of setting down plea for argument reply and take issue on it, he admits its sufficiency as a defense, if the facts it alleges shall be established (*Myers v. Dorr*, 13 Blatchf. 23), and if the facts are proven the dismissal of the bill is simply a matter of course. *Gernon v. Bocaline*, 2 Wash. C. C. 199.

RULE 34.

Costs on demurrer overruled.—If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period, unless the court shall be satisfied that the defendant had good ground in point of law or fact to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the

bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him, *pro confesso*, and the matter thereof proceeded in and decreed accordingly.

Demurrer overruled.—On overruling of demurrer or plea, defendant may answer as matter of right. *Sims v. Lyle*, 4 Wash. C. C. 303; *Wooster v. Blake*, 7 Fed. Rep. 816. In such cases before a bill can be taken for confessed, the defendant must have been ruled to answer. *Halderman v. Halderman*, Hemp. 407. Where some of defendants fail to answer, the bill as to them may be taken as confessed. *Suydam v. Beals*, 4 McLean, 12. If the decree is taken *pro confesso* before the time given to answer has expired, it will be set aside on motion. *Fellows v. Hall*, 3 McLean, 487.

RULE 35.

Costs on demurrer allowed.—If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.

Demurrer allowed.—Costs are allowed in the discretion of the court. *Brooks v. Byam*, 2 Story, 553. Plaintiff is not entitled as a matter of right to amend his bill after a demurrer thereto is sustained (*National Bank v. Carpenter*, 11 Otto, 567; *Hunt v. Rousmaniere's Admr.* 2 Mason, 342); but the court may in its discretion grant him leave to amend on reasonable terms. *Hunt v. Rousmaniere's Admr.* 2 Mason, 342; *Dwight v. Humphreys*, 3 McLean, 104; *Ketchum v. Driggs*, 6 McLean, 14. Amendments thus allowed do not affect the jurisdiction, but relate back to and become part of the original bill. *Gaylor v. R. R. Co.* 6 Biss. 286. An order refusing leave to thus amend cannot be reviewed in the supreme court. *National Bank v. Carpenter*, 11 Otto, 567.

RULE 36.

Demurrer, sufficiency of.—No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

RULE 37.

Demurrer and answer to same matter.—No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

Effect of.—Where the same matter is covered both by answer and by plea the plea will stand in the place of the answer and overrule it. *Lewis v. Baird*, 3 McLean, 56; *Ferguson v. O'Hara*, 1 Peters C. C. 493. Defendant cannot demur, plead, and answer to the whole bill at the same time. *Crescent City Co. v. Butcher's etc. Co.* 12 Fed. Rep. 225. Where the answer is broader than the plea the latter is overruled. *Lewis v. Baird*, 3 McLean, 56. The proper course in these cases is a motion to strike out, or to compel defendant to elect between an answer, demurrer, and plea. *Hayes v. Dayton*, 18 Blatchf. 420. But if plaintiff go to trial on plea or demurrer, he cannot object on the argument that the answer is a waiver of demurrer or plea. *Hayes v. Dayton*, 18 Blatchf. 420.

RULE 38.

Admission by failure to reply.—If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument, on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.

Dismissal on failure to reply.—Where a plea exists which has not been replied to or set down for hearing

before the second term after filing, cause will be dismissed. *Poultney v. Lafayette*, 3 How. 81; *Parton v. Prang*, 3 Cliff. 537; S. C. 2 Off. Pat. Gaz. 619. A replication to a plea admits its sufficiency as much as if set down for argument and allowed. *Hughes v. Blake*, 6 Wheat. 453. If instead of filing replication plaintiff set down cause for hearing, this admits the truth of everything well pleaded. *Parton v. Prang*, 3 Cliff. 537; *Leeds v. Marine Ins. Co.* 2 Wheat. 380. But a bill will not be dismissed unless the party had proper notice under Rule 4 of filing pleas or demurrers. *Newby v. Oregon C. R. R. Co.* 1 Sawy. 63. If a plea or demurrer is insufficient under Rule 31 in not having proper certificate and affidavit, failure to act on it is no ground for dismissal. *National Bank v. Insurance Co.* 14 Otto, 54. After decree for defendant, complainant cannot have his bill dismissed because of his own neglect to reply to a plea filed by a party who never insisted upon dismissal, nor took any exceptions to the refusal of the court to dismiss the bill. *Chicago etc. R. R. Co. v. Union Rolling M. Co.* 109 U. S. 702.

ANSWERS.

RULE 39.

Sufficiency of.—The rule, that if the defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar, and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example,

a *bona fide* purchaser for a valuable consideration, without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

Extent and sufficiency of.—If by answer defendant set up a bar, he need not answer further, and his failure to answer is no ground of exception (*Gaines v. Agnelly*, 1 Woods, 238), as where bar of Statute of Limitations is set up. *Sample v. The Bank*, 1 Woods, 523. But pleas to the jurisdiction do not excuse further answer. They cannot be taken advantage of by general answer (*Livingston v. Story*, 11 Peters, 352); but must be taken by special plea. *Wickliffe v. Owings*, 17 How. 47; *Wood v. Mann*, 1 Sum. 578. Where the answer admits the facts, but sets up matter by way of avoidance, plaintiff need not prove the facts, but defendant must prove such matter in avoidance. *Clarke v. White*, 12 Peters, 178; *Randall v. Phillips*, 3 Mason, 378. All the facts called in question must be responded to by answer, and not by plea. *Bailey v. Wright*, 2 Bond, 181. Defendant's answer, if uncontradicted by any witness, is conclusive evidence in his favor. *Lenox v. Prout*, 3 Wheat. 520; *Union Bank v. Geary*, 5 Peters, 93; *Higbe v. Hopkins*, 1 Wash. C. C. 230; *Carpenter v. Prov. W. I. Co.* 4 How. 185; *Hughes v. Blake*, 1 Mason, 515; *Langdon v. Goddard*, 2 Story, 267; *Gould v. Gould*, 3 Story, 516; *Greeley v. Smith*, 3 Story, 659. It must be impugned by more than the testimony of one witness. *Towne v. Smith*, 1 Wood. & M. 115; *Delano v. Winsor*, 1 Cliff. 501; *Pomeroy v. Manin*, 2 Paine, 476. Complainant must have at least two witnesses, or one witness and corroborative circumstances, or he is not entitled to relief. *Toby v. Leonard*, 2 Cliff. 40; *Gilman v. Libbey*, 4 Cliff. 447; *Hayward v. National Bank*, 2 Cliff. 294; *Gernor v. Boccaline*, 2 Wash. C. C. 199; *Walker v. Derby*, 5 Biss. 134. Where the answer relies on new matter defendant must prove it; the answer is not evidence to support it. *Randall v. Phillips*, 3 Mason, 378. Defendant cannot make out one case in the answer and another on the proof; the *allegata* and *probata* must

agree. *Boone v. Chiles*, 10 Peters, 177. The answer of a defendant is not evidence against a co-defendant (*Field v. Holland*, 6 Cranch, 8; *Russell v. Clark*, 7 Cranch, 69; *Clarke's Ex. v. Van Reimsdyk*, 9 Cranch, 153; *Leeds v. Marine Ins. Co.* 2 Wheat. 380; *Morris v. Nixon*, 1 How. 119); except where the defendants are partners (*Van Reimsdyk v. Kane*, 1 Gall. 630); or defendants are privies in estate. *Osborne v. U. S. Bank*, 9 Wheat. 738.

RULE 40.

Answer of defendant to interrogatories.—A defendant shall not be bound to answer any statement or charge in the bill, unless especially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

Ordered, that the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

Amended December Term, 1850, as in second paragraph, 10 How. v.

Requisites and forms of interrogatories prior to amendment.—See *Young v. Grundy*, 3 Cranch, 51; *Treadwell v. Cleveland*, 3 McLean, 283; *Langdon v. Goddard*, 3 Story, 13; *Parsons v. Cumming*, 1 Woods, 461. Where complainant desires to obtain a discovery he must propound the interrogatories according to the rules. *Bailey v. Young*, 12 Blatchf. 200.

RULE 41.

Interrogatories to be numbered.—The interrogatories

contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form, or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3," etc.; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

Answer, when not evidence. — If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section three of the act of Congress of July 2, 1864.

Second paragraph added by amendment, May 6, 1872, 13 Wall. xi. See Revised Statutes, § 858, *ante*.

Verification of answer, waiving of. — Where plaintiff does not waive the oath to the answer he is bound to produce two witnesses, or one and circumstances corroborating him, to overthrow it (*Slessinger v. Buckingham*, 8 Sawy. 469); but if plaintiff waive the oath the answer is not evidence. *Patterson v. Gaines*, 6 How. 550. But a waiver by bill of an oath to the answer

amounts to nothing unless accepted by respondents (*Amory v. Lawrence*, 3 Cliff. 524; *Holbrook v. Black*, 8 L. R. N. S. 89); and if not accepted defendant is bound to answer on oath. *Heath v. Erie R. R. Co.* 8 Blatchf. 348.

RULE 42.

Specified interrogatories part of the bill.—The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

RULE 43.

From preceding interrogating part.—Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "to the end thereof," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and repective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer made to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say,—

"1. Whether, etc.

"2. Whether, etc."

Answer to interrogatories.—Where the answer to interrogatories is evasive defendant will be ordered to make a full disclosure and to pay the costs of the hearing. *Langdon v. Goddard*, 3 Story, 13.

RULE 44.

What interrogatories need not be answered.—A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer.

RULE 45.

Special replication.—No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same, with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

Not permissible.—A special replication is not permitted. Matter formerly so pleaded must be set up by bill or amendment (*Taylor v. Benham*, 5 How. 233), as matter in response to allegations in the answer. *Taylor v. Benham*, 5 How. 233. New matter must be set out by amendment to the bill. *Wilson v. Stolly*, 4 McLean, 275; *Coleman v. Martin*, 6 Blatchf. 291. If a special replication is filed pleading new matter, such matter will be considered surplusage at the hearing. *Duponti v. Massy*, 4 Wash. C. C. 128. All amendments under this rule should be with leave of the court (*Clements v. Moore*, 6 Wall. 299); but if filed without leave and not objected to, objection is waived. *Clements v. Moore*, 6 Wall. 299.

RULE 46.

New or supplemental answer.—In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge

of the court, and upon his default the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

RULE 47.

Proper, when not necessary parties.—In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

Parties, proper, necessary and indispensable.—The general rule is that all persons interested should be made parties plaintiff or defendant, in order that a complete decree may be made (*Caldwell v. Taggart*, 4 Peters, 190; *Morgan v. Morgan*, 2 Wheat. 298; *Williams v. Bankhead*, 19 Wall. 263; *Van Reimsdyk v. Kane*, 1 Gall. 371), however numerous they may be. *West v. Randall*, 2 Mason, 181. This rule does not affect the jurisdiction but is discretionary, and may be modified according to circumstances. *Elmendorf v. Taylor*, 10 Wheat. 152. No person not made a party to the suit is bound by the decree. *Finley v. Bank of U. S.* 11 Wheat. 304. Nor is a decree authorized by Congress, or this court, in absence of a party whose rights may be affected by it. *Coiron v. Millandon*, 19 How. 113. Where no relief is sought against persons connected with the subject of the suit they should not be made parties defendant. *French v. Shoemaker*, 14 Wall. 314; *Fitch v. Creighton*, 24 How. 159; *Heath v. Erie Railway Co.* 8 Blatchf. 347; *Van Reimsdyk v. Kane*, 1 Gall. 371. Where parties are merely formal or only necessary parties, and are out of the jurisdiction of the court they will be dispensed with. *Abbott v. American H. R. Co.*

4 Blatchf. 491; *Elmendorf v. Taylor*, 10 Wheat. 152; *Mallow v. Hinde*, 12 Wheat. 193; *Vattier v. Hinde*, 7 Peters, 252; *McCoy v. Rhodes*, 11 How. 131. Where all the parties are not before the court and some are out of the jurisdiction, if a decree can be made without prejudice to their interests, this may be done. (*Cameron v. M'Roberts*, 3 Wheat. 591; *Harding v. Handy*, 11 Wheat. 103; *Gray v. Larrimore*, 2 Abb. U. S. 542; *Cole S. M. Co. v. Virginia & C. Co.* 1 Sawy. 470; *Payne v. Hook*, 7 Wall. 425); to make such a decree is discretionary with the court. *Merchants' Bank v. Seton*, 1 Peters, 299. This rule specially reserves the rights of absent parties. *Calhoun v. St. Louis & Co.* 14 Fed. Rep. 4. The joinder or non-joinder of merely formal parties does not oust the jurisdiction of this court. *Wormley v. Wormley*, 8 Wheat. 421; *Carneal v. Banks*, 10 Wheat. 181; *Ward v. Arredondo*, 1 Paine, 410. Court will dispense with joinder of those whose citizenship would oust the court if it can decide properly without them. *Harrison v. Urann*, 1 Story, 64; *Joy v. Wirtz*, 1 Wash. C. C. 517; *Drake v. Goodridge*, 6 Blatchf. 151. Where parties are indispensable to a decree, though out of the jurisdiction, the court will not proceed without them, and will dismiss the bill. *Riddle v. Mandeville*, 5 Cranch, 322; *Russell v. Clarke*, 7 Cranch, 64; *Marshall v. Beverly*, 5 Wheat. 313; *Connecticut v. Pennsylvania*, 5 Wheat. 424; *Barney v. Baltimore*, 6 Wall. 280; *Bank v. Carrolton R. R.* 11 Wall. 624; *Traders' Bank v. Campbell*, 14 Wall. 87; *Ribon v. R. R. Co.* 16 Wall. 446; *Young v. Cushing*, 4 Biss. 456; *Abbott v. American H. R. Co.* 4 Blatchf. 491; *Bunce v. Gallagher*, 5 Blatchf. 481; *Florence S. M. Co. v. Singer S. M. Co.* 8 Blatchf. 113; *Carson v. Robertson*, Chase, 475; *West v. Randall*, 2 Mason, 181; *Bank v. Smith*, 6 Fed. Rep. 215; *Dormitzer v. Ill. etc. B. Co.* 6 Fed. Rep. 217. The want of proper parties is not, of itself, sufficient ground for dismissing bill (*Milligan v. Milledge*, 3 Cranch, 220; *Hoxie v. Carr*, 1 Sum. 173); but the court will grant leave to make new parties, and if the parties cannot then be brought in the bill will be dismissed. *Hunt v. Wycliffe*, 2 Peters, 201; *Dandridge v. Washington's Exrs.* 2 Peters, 370; *Bank v. Carrolton R. R.* 11 Wall. 624. Those whose interests are in harmony should be joined as plaintiffs or defendants as the case may be. *Bunce v. Gallagher*, 5 Blatchf.

481; *Parsons v. Lyman*, 4 Blatchf. 432. Where the jurisdiction of the court would be ousted by making a person party plaintiff he may be made party defendant, and equally have benefit of the suit. *Brown v. Pac. M. S. S. Co.* 5 Blatchf. 526. Incompetent persons should be made parties, by guardian or committee. *Harrison v. Brown*, 4 Wash. C. C. 202. A jurisdiction depending on condition of parties is governed by that condition as at commencement of suit (*Connolly v. Taylor*, 2 Peters, 556), and is not ousted by subsequent change of condition. *Mollan v. Torrance*, 9 Wheat. 537.

RULE 48.

Parties too numerous.—Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

Parties too numerous.—The court will dispense with the necessity of bringing all parties before it, where they are too numerous or many of them unknown (*Mandeville v. Riggs*, 2 Peters, 482; *Brown v. Pac. M. S. S. Co.* 5 Blatchf. 525; *Campbell v. R. R. Co.* 1 Woods, 368; *Wilmer v. Atlanta etc. Co.* 2 Woods, 447), or where the question is one of general interest, and a few sue for all. *West v. Randall*, 2 Mason, 181. This rule specially reserves the rights of absent parties, as the decree does not bind them. *Calhoun v. St. Louis Ry.* Co. 14 Fed. Rep. 4.

RULE 49.

Trustees, etc., as parties.—In all suits concerning real estate, which is vested in trustees by devise, and such trustees are competent to sell and give discharges for

the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, for the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

Application of rule.—It is only where the fee is actually vested in the executor or trustee that the rule applies. *Chew v. Hyman*, 10 Biss. 240.

RULE 50.

Heir-at-law, when a necessary party.—In suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party where he desires to have the will established against him.

RULE 51.

Joint debtors.—In all cases in which the plaintiff has a joint and several demand against several persons, either as principles or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

RULE 52.

Defects of parties suggested in answer.—Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at

liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order book, in the form or to the effect following, that is to say: "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

Defect for want of parties.— Before a bill can be dismissed for defect of parties, the objection must have been taken by demurrer, plea, or answer. *Greenleaf v. Queen*, 1 Peters, 138; *U. S. v. Gillespie*, 6 Fed. Rep. 803. The objection should specify names, description, and necessity of such parties. *Legge v. Thomas*, 7 Blatchf. 11. Where the objection is sustained the court will order all proper parties to be made. *Harrison v. Rowan*, 4 Wash. C. C. 202.

RULE 53.

Defect of parties suggested at hearing.— If a defendant will, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

Defect of parties at hearing.— It is generally too late to first take the objection of want of parties at the hearing (*Legge v. Thomas*, 3 Blatchf. 11), and will not avail except in extreme cases (*Mechanics' Bank v. Seton*, 1 Peters, 299; *Story v. Livingston*, 13 Peters, 359), as

where the court cannot proceed to a decree without prejudice to the rights of such absent parties *Wallace v. Holmes*, 9 Blatchf. 65.

NOMINAL PARTIES TO BILLS.

RULE 54.

When party need not appear.—Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him so to do by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer, he shall be entitled to the costs of all the proceedings against him, unless the court shall otherwise direct.

Nominal party need not appear.—This court will not suffer its jurisdiction to be ousted by the joinder of a nominal party not entitled to sue or be sued, but will make a decree without prejudice to him. *Wormley v. Wormley*, 8 Wheat. 422.

RULE 55.

Injunction, when granted as of course.—Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place

ordered. In every case where an injunction, either the common injunction or a special injunction, is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

Injunctions generally.—A bill to enjoin a judgment at law is not an original bill (*Simms v. Guthrie*, 9 Cranch, 19), and jurisdiction therefor does not depend on citizenship, unless new parties are made or new interests involved. *Dunn v. Clarke*, 8 Peters, 1. A federal court cannot enjoin proceedings in a State court (*McKinne v. Voorhies*, 7 Cranch, 279; *Dial v. Reynolds*, 3 Otto, 34; Revised Statutes, § 720, *ante*), nor can a State court enjoin a federal court. *Diggs v. Wolcott*, 4 Cranch, 179; *Haines v. Carpenter*, 1 Otto, 254; *City Bank v. Skelton*, 2 Blatchf. 26. An injunction will not be granted if the rights of third persons are concerned, unless they can be made parties. *Whepley v. Erie Ry. Co.* 2 Blatchf. 271. An injunction will not be granted pending a plea to the jurisdiction (*Ewing v. Blight*, 3 Wall. Jr. 139); but to prevent mischief an immediate hearing of the plea will be ordered (*Ewing v. Blight*, 3 Wall. Jr. 139); or if this cannot be done, court will order that defendants do nothing prejudicial to plaintiff's interests pending hearing of motion for injunction. *Fanshawe v. Tracy*, 4 Biss. 490; *Fremont v. Merced Mg. Co.* 1 McAll. 268. The court, on the other hand, will not allow the plaintiff to fix the time so far ahead as to embarrass defendant, but will anticipate the rule day. *Walworth v. Board of Supervisors*, 5 Biss. 133. A mandatory injunction will be granted only on final hearing, and then only to execute the decree. *McCauley v. Kellogg*, 2 Woods, 13. Notice of application for injunction is waived by appearance (*Marsh v. Bennett*, 5 McLean, 117); but no injunction can be granted except on reasonable notice. *Mowrey v. R. R. Co.* 4 Biss. 78. An injunction allowed in vacation expires at commencement of next term. *Gray v. Chicago etc. Co.* 1 Woolw. 63. A provisional injunction, granted on the filing of a bill, falls with dismissal of the bill. *Coleman v. Hudson R. R. Co.* 5 Blatchf. 57. Where an injunction to stay proceedings at law is

granted without answer, it will not be dissolved until answer is filed (*Read v. Consequa*, 4 Wash. C. C. 174), and the motion to dissolve will be considered only on the questions raised in the answer. *Farmer v. Calvert Lith. Co.* 1 Flipp. 228. The dissolution of an injunction which may do irreparable injury rests in discretion of the court, either before answer or after. *Poor v. Carleton*, 3 Sum. 70.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

RULE 56.

Bill of revivor, when proper.—Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

Abatement and revivor.—Wherever a suit shall abate by reason of death or absence of a party or other event, a bill of revivor is necessary to reopen the proceedings (*Kentucky v. Georgia St. Bk.* 8 How. 586), and the party may have it as a matter of right. *Fitzpatrick v. Domingo*, 14 Fed. Rep. 216. It is not the commencement of a new suit, but merely the continuance of the old one. *Fitzpatrick v. Domingo*, 14 Fed. Rep. 216; *Clarke v. Mathewson*, 12 Peters, 164. Though the original parties were citizens of different States, the suit cannot be revived where the new parties would be citizens of the same State. *Clarke v. Matthews*, 2 Sum. 262. Where

proceedings are revived, the practice is to admit all testimony which might have been used before abatement. *Vattier v. Hinde*, 7 Peters, 252. See *ante*, § 660.

RULE 57.

Supplemental bill, when proper.—Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason, a supplemental bill or a bill in the nature of a supplemental bill may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by the judge of the court.

Allowance of.—Matters happening after the filing of the bill should be supplied by supplemental bill (*Kennedy v. Georgia St. Bk.* 8 How. 610), as where there has been a change of interest *pendente lite* (*Hoxie v. Carr*, 1 Sum. 173; *Tappan v. Smith*, 5 Biss. 73), or to introduce matter which accrued subsequent to filing original bill (*Jenkins v. Eldredge*, 3 Story, 299; *Copen v. Flesher*, 1 Bond, 440), or matter of which plaintiff had no information at time of filing bill. *Caster v. Wood*, 1 Bald. 289. The averments themselves need not be embraced in the petition for leave to file them, but only the ground for so doing. *Parkhurst v. Kinsman*, 2 Blatchf. 72. Plaintiff will not be allowed by way of supplemental bill to file matter which will change the character of the suit. *Snead v. McCoull*, 12 How. 407.

RULE 58.

What need not be set forth.—It shall not be necessary in any bill of revivor or supplemental bill to set forth

any of the statements in the original suit, unless the special circumstances of the case may require it.

ANSWERS.

RULE 59.

Verification, before whom.—Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory, or before any notary public.

Amendment promulgated March 5, 1889, 129 U. S. 701.

Answer from beyond the sea.—An answer in chancery from beyond the sea must be taken by a commissioner under a *dedimus* issued by this court. Read *v. Consequa*, 4 Wash. C. C. 335; *Herman v. Herman*, 4 Wash. C. C. 555.

AMENDMENT OF ANSWERS.

RULE 60.

Wherein amendable.—After an answer is put in, it may be amended as of course, in any matter of form, or by filing up a blank or correcting a date, or reference to a document or other small matter, and be resworn at any time before a replication is put in or the cause is set down for a hearing upon bill and answer. But after replication or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements except by special leave of the court or of a judge thereof, upon motion and cause shown after due notice to the adverse party supported, if required, by affidavit. And in every case where leave is so granted, the court or the judge granting the same may

in his discretion require that the same be separately engrossed and added as a distinct amendment to the original answer so as to be distinguishable therefrom.

When allowed.—The allowance of amendments to answers is in the discretion of the court (*Caster v. Wood*, 1 Bald. 289), and that discretion will be exercised to forward justice and restrain gross and inexcusable neglect. *Calloway v. Dobson*, 1 Brock. 119. In certain cases amendments are allowed at any stage of the proceedings (*Rhode Island v. Massachusetts*, 13 Peters, 23), such as mistakes of dates, matters of form, and verbal inaccuracies. *Smith v. Babcock*, 3 Sum. 583. Amendments which change the character of the answer will rarely be admitted after hearing. *Waldon v. Bradley*, 14 Peters, 156. Where the proposed amendment could with diligence have been sooner introduced, it will not be allowed (*India Rub. Co. v. Phelps*, 8 Blatchf. 85), but where omitted through mistake it will usually be allowed. *Suydam v. Truesdale*, 6 McLean, 459. If the amendment contain the same matter and defense as the original answer it is impertinent. *Grier v. Gregg*, 4 McLean, 202.

EXCEPTIONS TO ANSWERS.

RULE 61.

When to be taken.—After an answer is filed on any rule day, the plaintiff shall be allowed until the next succeeding rule day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court or a judge thereof; and if no exceptions shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.

Exceptions for impertinence and insufficiency.—An exception that allegations which support the equity of the bill are neither answered, admitted, or denied, is good, and will be sustained. *Hardeman v. Harris*, 7 How. 726; *Read v. Consequa*, 4 Wash. C. C. 335. A denial on information and belief of any of the facts in the bill, is a good ground of exception. *Bradford v. Geiss*, 4

Wash. C. C. 513. An exception for impertinence is only allowed where apparent that the matter is not material or relevant. *Chapman v. School District*, Deady, 108. If after calling impertinent matter, the answer is insufficient, an exception taken therefore may be allowed. *Patriotic Bank v. Washington Bank*, 5 Cranch C. C. 602. An exception for insufficiency should state the charges in the bill, and answer thereto, *verbatim*, that the court may properly judge it. *Brooks v. Byam*, 1 Story, 296. The answer when excepted to, will be liberally construed, having regard to the case made by the bill. *Griswold v. Hill*, 1 Paine, 390. An exception to the answer is waived by going to trial on the merits. *Kitredge v. Race*, 92 U. S. 116.

RULE 62.

Separate answers, costs on.—When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had by two or more of the defendants separately, costs shall not be allowed for such separate answers or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.

RULE 63.

When to be set down for hearing.—Where exceptions shall be filed to the answer for insufficiency within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule day thereafter before a judge of the court, and shall enter, as of course, in the order book, an order for that purpose. And if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; *provided, however*, that the court, or any judge thereof,

may, for good cause shown, enlarge the time for filing exceptions, or for answering the same in his discretion, upon such terms as he may deem reasonable.

Exceptions, setting down for hearing.—Exceptions should be set down for hearing on a rule day before the judge. *La Vega v. Lapsley*, 1 Woods, 428. A reference before that time or to a master is a nullity and abandonment of the exception. *La Vega v. Lapsley*, 1 Woods, 428. Plaintiff may withdraw his exception and rejoin forthwith. *Penn v. Butler*, Wall. C. C. 4.

RULE 64.

Answer on allowance of exceptions.—If at the hearing the exceptions shall be allowed the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.

RULE 65.

Exceptions overruled costs.—If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

RULE 66.

When to be filed.—Whenever the answer of the de-

fendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

Replication, when allowed, etc.—The answer of every defendant must be replied to without reference to the state of the cause or of the pleadings in regard to any other defendant. *Coleman v. Martin*, 6 Blatchf. 291. Though a replication should be filed before cause is set down the court may allow plaintiff to file it afterwards. *Coleman v. Martin*, 6 Blatchf. 291. But it is too late after hearing to apply for leave to file it. *Bullinger v. Mackey*, 14 Blatchf. 355; *Fischer v. Wilson*, 16 Blatchf. 220. And the court will proceed to try the case on its merits, or allow one to be filed *instantly* when not on file at time of hearing. *Jones v. Brittan*, 1 Woods, 667. Where replication is not filed the order dismissing the bill is of course (*Robinson v. Satterlee*, 3 Sawy. 134); but the judge may allow the replication to be filed *nunc pro tunc*, and impose such terms as may be proper. *Washington R. R. v. Bradley's*, 10 Wall. 302; *Fischer v. Hayes*, 19 Blatchf. 26; S. C. 6 Fed. Rep. 76. If filed without leave, after time prescribed, the court may allow the replication to stand. *Fischer v. Hayes*, 19 Blatchf. 26. The objection that proper replication has not been filed cannot be taken for the first time in the Supreme Court. *Clements v. Moore*, 6 Wall. 299. A direct departure in the replication from the statements of the bill will not be permitted. *Vattier v. Hinde*, 19

Wall. 646. Special replications are disused, and new matter must be introduced by supplemental bill. *Duponti v. Mussy*, 4 Wall. 128. If introduced it will be treated as surplusage. *Duponti v. Mussy*, 4 Wall. 128; *Warren v. Van Brunt*, 19 Wall. 646. When a motion to strike the answer from the files is pending, the suit will not be dismissed for want of replication. *Allis v. Store*, 10 Biss. 57; S. C. 5 Fed. Rep. 203.

TESTIMONY—HOW TAKEN.

RULE 67.

Commissions, when taken out.—After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*.

Who to name commissioners.—In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.

Notice required.—Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings. Such examination shall take place in the presence of the parties or their agents, by their counsel or solici-

itors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; *provided*, that, by consent of parties, the examiner may take down the testimony of any witness in the form of narrative. At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; *provided*, that such stenographer or typewriter has been appointed by the court, or is approved by both parties. The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; *provided*, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal. The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

Amendment promulgated October Term, 1890, 139 U. S.

Compulsory attendance of witnesses.—In case of refusal of witnesses to attend, to be sworn, or to answer any

question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Re Allis, 44 Fed. Rep. 216; Hake v. Brown, 44 Fed. Rep. 734.

Notice of time and place.—Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

Transmission of deposition.—When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record in the same mode as prescribed in section 865 of the Revised Statutes.

A commission duly issued and executed will not be suppressed because when received by the clerk the envelope was open at one end as if worn by the mail. Eifert v. Craps, 44 Fed. Rep. 164.

Testimony, how taken.—Testimony may be taken on commission in the usual way by written interrogatories, and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.

Court may assign the time.—Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further

evidence shall be taken in the cause, unless by agreement of the parties, or by leave of court first obtained, on motion for cause shown.

Amendments promulgated December Term, 1854, 17 How. vii; December Term, 1861, 1 Black, vi; December Term, 1869, 9 Wall. vii. See Revised Statutes, 1863.

Expense of taking depositions.—The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Promulgated May 2, 1892.

Taking of testimony.—Any defendant whose answer is sufficient has a right to have the case as to him put at issue, and to proceed to take his testimony. *Coleman v. Martin*, 6 Blatchf. 291. The party may examine and cross-examine witnesses orally in open court (*Sickles v. Gloucester Co.* 3 Wall. Jr. 186; *Van Hook v. Pendleton*, 2 Blatchf. 85), or may take his testimony by commission. *Bronson v. La Crosse R. R. Co.* 9 Am. Law R. 350; *Bischoffsheim v. Baltzen*, 10 Fed. Rep. 1. The power still resides in the court to take testimony of witnesses in open court (In re *Clarke*, 9 Blatchf. 372), the passage of this rule merely providing that commissions may be taken. *Sickles v. Gloucester Co.* 3 Wall. Jr. 192. The court is authorized to appoint examiners to take testimony as well in as out of its territorial jurisdiction. *N. C. R. R. Co. v. Drew*, 3 Woods, 692. The motion for appointment of commissioners to take testimony abroad is not grantable of course. *U. S. v. Parrott*, 1 McAll. 447. The authority of commissioners is special and must be strictly pursued (*Armstrong v. Brown*, 1 Wash. C. C. 43; *Menus v. Dupont*, 3 Wash. C. C. 31; *Willings v. Consequa*, 1 Peters, 301; *Lonsdale v. Brown*, 3 Wash. C. C. 404), and the commission must be executed in the place directed and none other. *Boudereau v. Montgomery*, 4 Wash. C. C. 186; *Rhoades v. Selin*, 4 Wash. C. C. 715. Depositions taken under commission cannot be read, unless proof is

made that notice of rule therefor was properly served. *Rhoades v. Selin*, 4 Wash. C. C. 715. A deposition taken to be read in case of inability of witness to attend can only be read on proving such inability. *Read v. Bertrand*, 4 Wash. C. C. 558. Where parties cannot agree on interrogatories, they should be referred for settlement to a master, subject to a review of the court before commission issues. *Crocker v. Franklin Co.* 1 Story, 169. Each interrogatory should be separately answered, and the omission of such answer is fatal to the whole commission. *Ketland v. Bissett*, 1 Wash. C. C. 144. All interrogatories must be substantially answered (*Dodge v. Israel*, 4 Wash. C. C. 323); and if the general interrogatory is not answered, it is fatal to the deposition. *Richardson v. Golden*, 3 Wash. C. C. 109; *Rhoades v. Selin*, 4 Wash. C. C. 715. If the interrogatories are hypothetical, or to be asked in a certain event which does not happen, or refer to records which speak for themselves, they need not be answered. *Bell v. Davidson*, 3 Wash. C. C. 328. It is no objection that a material part of evidence comes in response to the general interrogatory. *Rhoades v. Selin*, 4 Wash. C. C. 715. A deposition in which only the direct interrogatories were put is fatally defective (*Gilpins v. Consequa*, 3 Wash. C. C. 184); but if no cross-interrogatories were filed the deposition, taken on the direct questions, may be admitted. *Gass v. Stinson*, 3 Sum. 98. It is no objection that direct and cross-interrogatories were answered at different times. *Gilpins v. Consequa*, 3 Wash. C. C. 184. The examiner is not compelled to file proofs taken until his fees are paid. *Freso v. Biedenfeld*, 14 Blatchf. 402. Where testimony is taken on commission the court will not, at the hearing, receive *viva voce* testimony except to prove an exhibit. *De Butts v. Bacon*, 1 Cranch C. C. 569.

RULE 68.

Testimony by deposition after issue.—Testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-

examination of the witness, either under a commission or by a new deposition taken under the acts of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.

Revised Statutes, §§ 863-875.

RULE 69.

Time allowed.—Three months and no more shall be allowed for the taking of testimony after the cause is at issue, unless the court or a judge thereof shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court upon due notice to the parties, or it may be enlarged, as he may deem reasonable under all the circumstances. But by consent of the parties publication of the testimony may at any time pass in the clerk's office, such consent being in writing, and a copy thereof entered in the order books or indorsed upon the deposition or testimony.

Amended December Term, 1869, 9 Wall. vii.

Time allowed for taking testimony.—For the purposes of this rule the cause is not at issue until it is so as to all defendants, or to one or more and confessed as to the rest (*Gilbert v. Van Arman*, 1 Flipp. 421), and unless so at issue the court will enlarge the time so that plaintiff may take proofs in respect to all defendants who plead. *Coleman v. Martin*, 6 Blatchf. 291. The three months allowed is for taking testimony of both plaintiff and defendant. *Ingle v. Jones*, 9 Wall. 486. Usually after publication of testimony no new witness can be examined or new evidence taken (*Wood v. Mann*, 2 Sum. 316), except in special cases on good cause shown, as surprise, accident, or fraud. *Wood v. Mann*, 2 Sum. 316. Exhibits may be proven after publication, and

even at the hearing. *De Butts v. Bacon*, 1 Cranch C. C. 569. So also may the credibility of witnesses whose depositions are before the court be proven by witnesses at the hearing. *Gass v. Stinson*, 2 Sum. 605; *Wood v. Mann*, 2 Sum. 316. Proofs not in proper time may be filed *nunc pro tunc* in the discretion of the court. *Fischer v. Hayes*, 19 Blatchf. 25; S. C. 6 Fed. Rep. 76. This rule applies as much to defendant as to complainants; and the allowance of further time is largely in the discretion of the court. *Ingle v. Jones*, 9 Wall. 486.

TESTIMONY DE BENE ESSE.

RULE 70.

When may be taken—Notice.—After any bill filed, and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners, as the judge of the court may direct, to take the examination of such witness or witnesses *de bene esse* upon giving due notice to the adverse party of the time and place of taking his testimony.

Party as witness.—This rule does not apply to the case of a party propounding himself as a witness. *Eslava v. Mazange's Admr.* 1 Woods, 624.

FORM OF THE LAST INTERROGATORY.

RULE 71.

Written interrogatories.—The last interrogatory in the written interrogatories to take testimony now commonly in use, shall in the future be altered, and stated in substance, thus: "Do you know, or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject

of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer."

General interrogatory.—In answer to this question, any further knowledge witness may have material to the cause is admissible. *Rhoades v. Selin*, 4 Wash. C. C. 715. If there is no answer whatever to this interrogatory, the deposition is fatally defective. *Richardson v. Golden*, 3 Wash. C. C. 109; *Dodge v. Israel*, 4 Wash. C. C. 323.

CROSS-BILL.

RULE 72.

Defendant to answer original bill.—Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.

Cross-bill, allowance of.—The filing of a cross-bill without leave is irregular and it may be set aside. *Bronson v. La Crosse R. R. Co.* 2 Wall. 283. A cross-bill is a mere auxiliary suit and must touch matters in question in the original bill. *Cross v. De Valle*, 1 Wall. 1. If it concern matter different from original bill, it is not a cross-bill. *Rubber Co. v. Goodyear*, 9 Wall. 807; *Heath v. Erie Ry. Co.* 9 Blatchf. 316; *Forbes v. R. R. Co.* 2 Woods, 323. Matter cannot be litigated between defendants, by way of a cross-bill, which is foreign to the original bill (*Putnam v. New Albany*, 4 Biss. 365), nor can cross-bill be used for setting any controversy between defendants, unless necessary to a complete decree on original bill. *Weaver v. Alter*, 3 Woods, 152. New parties cannot be brought into a cross-bill. *Sheils v. Barrow*, 17 How. 130. A cross-bill may be used to

discover whether a party is the real or merely nominal plaintiff (*Young v. Pott*, 4 Wash. C. C. 521), or to establish a conveyance which original bill seeks to set aside. *Carnochan v. Christie*, 11 Wheat. 446. Where the court has jurisdiction it is no valid objection on a cross-bill that parties are citizens of the same State (*Peay v. Schenck*, 1 Woolw. 175), nor can the objection be taken that a State court had acquired prior jurisdiction. *Brandon etc. Manuf. Co. v. Priine*, 14 Blatchf. 371. The original cause will not be heard until cross-bill is answered. *Young v. Pott*, 4 Wash. 521. Where the cross-bill and answers are filed, a decree disposing of the whole case should settle the issues raised in them. *Moore v. Huntington*, 17 Wall. 417. If after filing cross-bill plaintiff dismiss original bill, defendant is entitled to decree *pro confesso* on the cross-bill. *Lowenstein v. Glidewell*, 5 Dill. 325.

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

RULE 73.

Account of personal estate.—Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master, to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

Account, how taken.—Where an account is necessary, the court usually ascertains the amounts by reference to a master. *Kelsey v. Hobby*, 16 Peters, 269. This is usually necessary where a bill is taken *pro confesso*. *Pendleton v. Evan's Exrs.* 4 Wash. C. C. 391. In cases of infringement, reference is usually ordered to ascertain loss and profits. *Allen v. Blunt*, 1 Blatchf. 480. A complex and intricate account is an unfit subject for examination in a court, and should be referred to a master. *St. Colombe v. U. S.* 7 Peters, 625. The court may itself ascertain the facts if enabled by the evidence to do so, and it will not then order a reference (*Field v. Holland*, 6 Cranch, 8; *Lawrence v. Dana*, 4 Cliff. 6), unless both parties desire a reference and acquiesce in

the delay and expense thereof. *Jewett v. Cunard*, 3 Wood. & M. 277.

RULE 74.

Reference, when to be laid before master.—Whenever any reference of any matter is made to a master to examine and report thereon; the party at whose instance and for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.

RULE 75.

Duty of master.—Upon every such reference it shall be the duty of the master, as soon as he reasonably can, after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at the liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay.

RULE 76.

Report, what need not contain.—In the reports made

by the master to the court no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.

RULE 77.

Proceedings before master.—The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office, or by deposition, according to the acts of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

Proceedings before master.—The master is at liberty to examine any witness either on interrogatories or *viva voce*, or both (*Foote v. Silsby*, 3 Blatchf. 507), and for the same reason that a court may do so. *Story v. Livingston*, 13 Peters, 359. The master's conduct and report will be regarded as correct in the matters, unless

specially excepted to. *Harding v. Handy*, 11 Wheat. 103; *Story v. Livingston*, 13 Peters, 359.

RULE 78.

Witnesses, how summoned.— Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or to give evidence, it shall be deemed a contempt of the court, which, being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

Witness, examination, before master or in court.— A refusal to produce books or papers on master's order is a contempt and punishable as such. *Erie Ry. Co. v. Heath*, 8 Blatchf. 413. This rule does not change the practice, and generally oral examination on the trial will not be admitted. *R. R. Co. v. Drew*, 3 Woods, 692. But witnesses may be examined in open court in discretion of judge. *In re Clarke*, 9 Blatchf. 372. Usually witnesses are heard in court as to creditability of other witnesses and their depositions, or to verify exhibits. *R. R. Co. v. Drew*, 3 Woods, 692. A witness who has given his deposition cannot be examined anew without special order of court. *Gass v. Stinson*, 2 Sum. 605.

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Where leave is thus granted, witness can only be re-examined as to facts not already testified to by him. *Jenkins v. Eldridge*, 3 Story, 299.

RULE 79.

Accounts, production and examination of party.—All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in shall be at liberty to examine the accounting party, *viva voce*, or upon interrogatories in the master's office, or by deposition, as the master shall direct.

RULE 80.

Affidavits, what used.—All affidavits, depositions, and documents which have been previously made, read, or used in the court, upon any proceeding in any cause or matter, may be used before the master.

RULE 81.

Examination of creditor or claimant.—The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or on both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

See *Story v. Livingston*, 13 Peters, 359.

RULE 82.

Appointment of masters, compensation.—The circuit courts may appoint standing masters in chancery in their respective districts, both the judges concurring in

the appointment; and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if upon notice thereof he does not pay it within the time prescribed by the court.

Master, appointment and compensation of.—The appointment both of standing and special masters is left wholly with the circuit courts in their discretion. *Van Hook v. Pendleton*, 2 Blatchf. 85. Clerks and deputy clerks shall not be appointed masters, except on special grounds to be assigned in the order of appointment. Acts of Congress, 1879, ch. 183, p. 415. A master must file his report whether his fees are paid or not, but attachment will issue therefor if not paid (*Frese v. Biedenfeld*, 14 Blatchf. 402), and the issuance of this attachment is not stayed by proceedings for an appeal. *Myers v. Dunbar*, 12 Blatchf. 380.

EXCEPTIONS TO REPORT OF MASTER.

RULE 83.

When may be taken.—The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule day after the month is expired.

If exceptions are filed they shall stand for hearing before the court, if the court is then in session ; or, if not, then at the next sitting of the court which shall be held thereafter by adjournment or otherwise.

Exceptions to master's report.— The parties may except to the master's report, and thus bring any matter decided by him before the court for review (*St. Colombe v. U. S. 7 Peters*, 625); but such matter will not be set aside unless some abuse of power or clear abuse is shown. *Mason v. Crosby*, 3 Wood. & M. 258. On exception to master's report a general assignment of errors is insufficient. *Dexter v. Arnold*, 2 Sum. 108. The exceptions are in the nature of a demurrer, and the court will only regard errors specifically pointed out (*Story v. Livingston*, 13 Peters, 359; *Green v. Bishop*, 1 Cliff. 186; *Foster v. Goddard*, 1 Black, 506; *Chappedelaine v. Dechenaux*, 4 Cranch, 306; *Turrill v. R. R. Co.* 5 Biss. 345), and supported by the special statement of the master. *Harding v. Handy*, 11 Wheat. 104. The exceptions should be precise, and raise well-defined issues. *Stanton v. R. R. Co.* 2 Woods, 507. Master's report will not be corrected because immaterial evidence was wrongly admitted. *Garretson v. Clark*, 15 Blatchf. 70. The exceptions need not be formally allowed or disallowed on the record, but the master's report will be reformed accordingly. *Oliver v. Platt*, 3 How. 334. No objection to master's report can be urged which was not taken at the time and before the master. *McMicken v. Perin*, 18 How. 507; *Troy etc. Co. v. Corning*, 6 Blatchf. 328; *Gaines v. New Orleans*, 1 Woods, 104; *Cowdrey v. R. R. Co.* 1 Woods, 331.

RULE 84.

Costs and exceptions.— And in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs, the costs to be fixed in each case by the court by a standing rule of the circuit court.

Costs, what are.—A solicitor's fee is not a cost within the meaning of this rule. *Garretson v. Clark*, 17 Blatchf. 256.

DECREES.

RULE 85.

Correction of clerical mistakes.—Clerical mistakes in decrees, or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.

Enrollment of.—All decrees are deemed to be enrolled as of term in which they are made. *Dexter v. Arnold*, 5 Mason, 303; *Whiting v. U. S. Bank*, 13 Peters, 6.

RULE 86.

Not contain pleadings.—In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz." [Here insert the decree or order.]

Form of decree.—The decree should not recite pleadings or ordinarily facts of case (*Whiting v. U. S. Bank*, 13 Peters, 16); but the court may occasionally state in the decree conclusions of fact as well as of law. *Putnam v. Day*, 22 Wall. 60. There should be first an interlocutory order, and when the amounts and the like have been ascertained, the final decree should be entered. *Forgay v. Conrad*, 6 How. 201; *R. R. Co. v. Swasey*, 23 Wall. 405.

GUARDIANS AND PROCHEIN AMIS.**RULE 87.**

How appointed.—Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

Infants parties.—Infants defend by guardian appointed by court; usually nearest relation not interested. *Bank of U. S. v. Ritchie*, 8 Peters, 128.

REHEARING.**RULE 88.**

Rehearing petition, what to contain.—Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party, or by some other person. No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

Rehearing, when allowed.—Rehearings are allowed only where some plain omission or mistake has been made (*Jenkins v. Eldredge*, 3 Story, 299) sufficient to justify a new trial at common law (*Bentley v. Phelps*, 3 Wood. & M. 403), and the application for rehearing should state some such reason. *Hunter v. Marlboro*, 2 Wood. & M. 168. Where a party obtains rehearing on new evidence he should file a supplemental bill stating such evidence. *Baker v. Whiting*, 1 Story, 218. A rehear-

ing will not be granted on the certificate of counsel merely, that there are good grounds therefor. *Emerson v. Davies*, 1 Wood. & M. 21; *Tufts v. Tufts*, 3 Wood. & M. 426. A petition for rehearing is not granted *ex parte*, but only on notice to the adverse party. *Giant Powder Co. v. Cal. V. P. Co.* 6 Sawy. 509. A final decree cannot be annulled or set aside after the term when rendered, except by appeal or bill of review and not by rehearing (*Scott v. Blaine*, 1 Bald. 287; *Roemer v. Simon*, 1 Otto, 149); and this rule is imperative (*Scott v. Hore*, 1 Hughes, 163), except where there is no appeal to the supreme court, when it may be reheard if petition for rehearing be filed before end of next term after decree. *Clarke v. Threkeld*, 2 Cranch, 408. Allowance for rehearings after decree are not a matter of right, but discretionary with court. *Daniel v. Mitchell*, 1 Story, 198; *American etc. Co. v. Sheldon*, 18 Blatchf. 50. The text of this rule cited in *Easton v. Houston etc.* R. R. Co. 44 Fed. Rep. 7; *Roemer v. Simon*, 91 U. S. 149; *Glenn v. Noonan*, 43 Fed. Rep. 403; *Glenn v. Dimmock*, 43 Fed. Rep. 550; *Morgan's etc. Co. v. Tex. Cent. Ry. Co.* 32 Fed. Rep. 530, quoting *Sibbald v. U. S.* 12 Peters, 488; *Bank v. Moss*, 6 How. 31; *Bronson v. Schulten*, 104 U. S. 415; *Schell v. Dodge*, 107 U. S. 630; *Phillips v. Negley*, 117 U. S. 665; *Cannon v. U. S.* 116 U. S. 55.

RULE 89.

Rules may be made by circuit courts.—The circuit courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

Extent of.—Where no rule is prescribed by supreme court, circuit courts have power to regulate by rule, the model of conducting trials, order of evidence, etc. *Phila. etc. Co. v. Stimson*, 14 Peters, 448; *Steam S. C. Co. v. Jones*, 13 Fed. Rep. 581. Equity courts will mold their rules so as to prevent injustice. *Poultney v. Lafayette*, 12 Peters, 472. Rules made by the court can

be waived or modified for good reason. *Russell v. McLellan*, 3 Wood. & M. 157. But this court cannot rescind or modify a rule prescribed by the supreme court for its government. *Jenkins v. Greenwald*, 1 Bond, 127. No rule can be allowed which is inconsistent with those established by the supreme court. *Bank of U. S. v. White*, 8 Peters, 262.

RULE 90.

Practice.—In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

English practice, how far adopted.—This rule adopts the English practice as it was known and understood at the time this rule was ordained. *Badger v. Badger*, 1 Cliff. 237. This rule neither enlarges nor limits the jurisdiction, but simply regulates the practice where this court has jurisdiction. *Lewis v. Shainwald*, 7 Sawy. 403. It is the practice of the English court of chancery, and not the court of exchequer that forms the basis of our equity practice. *Smith v. Burnham*, 2 Sum. 612. The courts will follow this practice subject to such alterations as may under the acts of Congress be from time to time prescribed (*Boyle v. Zacharie*, 6 Peters, 648; *Livingston v. Story*, 9 Peters, 632; *S. C.* 13 Peters, 359; *Rhode Island v. Massachusetts*, 14 Peters, 210; *Emerson v. Davies*, 1 Wood. & M. 21; *Lorillard v. Standard Oil Co.* 18 Blatchf. 199), and it shall govern the practice in all cases where the supreme court rules do not apply. *Pomeroy v. Manin*, 2 Paine, 476; *Good-year v. Prov. Rub. Co.* 2 Cliff. 351. The practice of State courts will not control these courts unless they adopt that practice as their own. *U. S. v. Parrott*, McAll. 447; *Martindale v. Waas*, 11 Fed. Rep. 551.

And no practice inconsistent with these rules can be established. *U. S. Bank v. White*, 8 Peters, 262.

RULE 91.

Affirmation equivalent to oath.—Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof, make solemn affirmation to the truth of the facts stated by him.

RULE 92.

Decree in foreclosure suits.—In suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

Promulgated April 18, 1864, 1 Wall. v.

RULE 93.

Appeal in injunction cases, discretion.—When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.

Promulgated January 13, 1879, 7 Otto, vii.

RULE 94.

Bill by stockholder against corporation.—Every bill brought by one or more stockholders in a corporation against the corporation and other parties founded on a right which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and if necessary, of the shareholders, and the cause of his failure to obtain such action.

Promulgated January 23, 1882, 14 Otto, ix.

Application of rule.—This rule applies only to a suit by stockholders against corporation founded on rights which the corporation may properly assert, and not on other rights. *Leo v. U. P. R. Co.* 17 Fed. Rep. 273. Plaintiff must show the efforts on his own part, and not on the part of others to secure redress. *Dannmeyer v. Coleman*, 11 Fed. Rep. 101.

RULES OF PRACTICE
FOR THE
COURTS OF THE UNITED STATES.

IN

**ADMIRALTY AND MARITIME JURISDICTION, ON THE IN-
STANCE SIDE OF THE COURT IN PURSUANCE OF
THE ACT OF THE TWENTY-THIRD OF
AUGUST, 1842, CHAPTER 188.**

RULE 1.

Process, issue and service of. — No mesne process shall issue from the district courts in any civil cause of admiralty and maritime jurisdiction until the libel, or libel of information, shall be filed in the clerk's office from which such process is to issue. All process shall be served by the marshal, or by his deputy, or where he or they are interested, by some discrete and disinterested person appointed by the court.

Process, issue and service of. — United States admiralty courts may proceed under their general powers in every case where not restrained by statute. *U. S. v. Schooner Little Charles*, 1 Brock. 380. But the processes of these courts are subject to the supreme court, and the rules adopted by it therefor are conclusive on them. *Marshall v. Bazin*, 7 N. Y. Leg. Obs. 342. Original process must be served by the marshal or his deputy, and not by

private persons. *Schwabaker v. Reilly*, 2 Dill. 127. Subpoenas are not necessarily served by the marshal. *Schwabaker v. Reilly*, 2 Dill. 127.

RULE 2.

In suits in personam, nature of.—In suits *in personam* the mesne process may be by a simple warrant of arrest of the person of the defendant in the nature of a *capais*, or by a warrant of arrest of the person of the defendant, with a clause therein that if he cannot be found, to attach his goods and chattels to the amount sued for; or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or by a simple monition in the nature of a summons to appear and answer to the suit, as the libellant shall in his libel or information pray for or elect.

Process in personam.—The process may be by arrest of the master or owner, or by attachment against the vessel. *North v. Brig Eagle*, Bee, 78. Attachment will lie both in cases of contract and of tort. *McGrath v. Candelero*, Bee, 64. Whenever defendant has concealed himself or absconded, process by attachment will issue against his goods within the jurisdiction. *Manro v. Almeida*, 10 Wheat. 473; *Bouysson v. Miller*, Bee, 187. The ship and other tangible property are "effects" in the meaning of this rule (*The Alpena*, 7 Fed. Rep. 361), and may be reached by writ of garnishment in the hands of third persons. *The Alpena*, 7 Fed. Rep. 361. By the ancient and settled practice of courts of admiralty, a libel *in personam* may be maintained for any cause within their jurisdiction, wherever a motion can be served upon the libelee, or an attachment be made on any personal property or credits. *Manro v. Almeida*, 23 U. S. 473; *Atkins v. Disnite Grating Co.* 85 U. S. 272; *New England Ins. Co. v. Detroit & C. Steam Nav. Co.* 85 U. S. 307; *Cushing v. Laird*, 107 U. S. 69; *Devoe Mfg. Co. v. Petitioner*, 108 U. S. 401; *Ex parte Louisville Underwriters*, 134 U. S. 488. But if he cannot be found an attachment of his goods and chattels does not

authorize an attachment in Alabama, where imprisonment for debt has been abolished. *Chiesa v. Conover*, 36 Fed. Rep. 334; *The Bremana v. Card*, 38 Fed. Rep. 144. See Rule 47.

RULE 3

Bails, summary process.—In all suits *in personam* where a simple warrant of arrest issues and is executed, the marshal may take bail, with sufficient sureties, from the party arrested by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

Bail bonds, summary process.—To entitle a discharge from arrest, the bond should be not only for costs, but to satisfy the decree made against him (*Gardner v. Isaacson*, Abb. Adm. 141), in the court which shall ultimately decide the cause. *U. S. v. Schooner Little Charles*, 1 Brock. 380. A party cannot be held to bail in two places at the same time for the same cause of action. *Bingham v. Wilkins*, *Crabbe*, 50. Upon the decree execution issues summarily against stipulators, their submission thereto being a condition in such bonds. *Gaines v. Travis*, Abb. Adm. 422.

RULE 4.

Attachment, when may be dissolved.—In all suits *in personam* where goods and chattels or credits and effects are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable upon

the defendant whose property is so attached, giving a bond or stipulation, with sufficient sureties, to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.

Bond to release attachment. — The bond under this rule is accepted as a substitute for the property in subsequent proceedings. *U. S. v. Ames*, 9 Otto, 35.

RULE 5.

Bonds or stipulations. — Bonds, or stipulations in admiralty suits, may be given and taken in open court or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

Amended May 6, 1872, 13 Wall. xiv.

Defective stipulation or bond. — A defect in execution of a bond or stipulation is deemed waived unless excepted to before close of term next after becoming known. *The Infanta*, Abb. Adm. 327.

RULE 6.

Bail, reduction — New sureties. — In all suits *in personam* where bail is taken the court may upon motion, for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending

the suit, new sureties may be required by the order of the court to be given upon motion and due proof thereof.

RULE 7.

Warrant of arrest, when may issue.—In suits *in personam* no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars unless by the special order of the court, upon affidavit or other proper proof, showing the propriety thereof.

RULE 8.

Ship's tackle, etc., possession, how obtained.—In all suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer if upon the hearing the same is required by law and justice.

RULE 9.

Cases of seizure, process in.—In all cases of seizure, and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested; and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody, and shall cause public notice thereof, and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order; and if there is no newspaper published therein,

then in such other public places in the district as the court shall direct.

Process in rem.—Where the federal and State courts have concurrent jurisdiction *in rem*, the right to maintain it attaches to the tribunal which first exercises it (Ship Robert Fulton, 1 Paine, 620); the State court cannot by its attachment supersede that of the federal court (Certain Logs v. Mahogany, 2 Sum. 589), nor will the federal court interfere after an attachment by State court, but will leave property in its possession to prevent a conflict of jurisdiction. Ship Robert Fulton, 1 Paine, 620. Property so attached will be released on the filing of a bond according to the form used by the court. Poland v. Brig Spartan, 1 Ware, 134.

RULE 10.

Perishable goods.—In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury by being detained in custody pending the suit, the court may, upon the application of either party, in its discretion, order the same or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury; and the proceeds, or so much thereof as shall be a full security to satisfy in decree, to be brought into court to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him, upon a due appraisal to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties in such sum as the court shall direct, to abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

Sale of.—Where a cargo is liable to deterioration or a ship to injury by delay, proper cause is to apply for a sale of the same. Ship Nathaniel Hooper, 3 Sum. 542.

RULE 11.

Ship, delivery to claimant.—In like manner, where any ship shall be arrested the same may, upon the application of the claimant, be delivered to him, upon a due appraisement to be had, under the direction of the court, upon the claimants depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties as aforesaid; and if the claimant shall decline any such application, then the court may in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court, or otherwise disposed of as it may deem most for the benefit of all concerned.

Release of, on filing bond.—Where a ship is delivered upon appraisement and stipulation, owner cannot be held liable to any greater extent, nor can he complain that the ship was worth less. *The Virgin*, 8 Peters, 538. Where only one of several claimants sign the stipulation, he is the only one held liable. *S. S. Zodiac*, 5 Fed. Rep. 220. A vessel will not be released during appeal. *The Bark Adolph*, 8 Peters, 114. A tender, by the consignee of goods, of the freight due, made pending a suit for the freight, but not followed by a deposit in the registry, has no effect upon the liability for the subsequent costs on dismissal of the suit. *Henderson v. Three Hundred Tons Iron Ore*, 38 Fed. Rep. 36.

RULE 12.

Suits by material men.—In all suits by material men for supplies, or repairs, or other necessities, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*.

Amended May 1, 1850, 21 How. vi, and May 6, 1872, 12 Wall. xiv.

Suits for value of necessities.—This rule does not enlarge the jurisdiction of the courts, but is made in the exercise of the power to regulate processes and procedure. *Steamer Lawrence*, 1 Black, 522; *Orleans v.*

Phoebus, 11 Peters, 175; Boon v. Hornet, Crabbe, 426; The Chusan, 2 Story, 455. Congress by conferring admiralty jurisdiction impliedly adopts the maritime law. The Chusan, 2 Story, 455. The admiralty has jurisdiction *in rem* for necessities and supplies furnished to foreign ships in our ports, to our ships in foreign ports, and to ships belonging in one State furnished in another. Brig Nestor, 1 Sum. 73. Necessaries are those things which pertain to or are directly connected with or necessary to the navigation and voyage of the vessel. Hubbard v. Roach, 9 Biss. 375. Material men who furnish supplies to a foreign ship have a lien on it, and may enforce their right *in rem* in admiralty; such right is given by the maritime law. The Aurora, 1 Wheat. 105; Gen. Smith, 4 Wheat. 433; The St. Jago de Cuba, 9 Wheat. 409; Ship Robert Fulton, 1 Paine, 620; Ship Nestor, 1 Sum. 73; Peyroux v. Howard, 7 Peters, 324; Ship Virgin, 8 Peters, 538; New Jersey etc. Co. v. Merchants' Bank, 6 How. 390; Davis v. The Brig, Gilp. 473; Gardner v. New Jersey, 1 Pet. Admr. 227; Stevens v. The Sandwich, 1 Pet. Adm. 233; Zane v. Brig President, 4 Wash. C. C. 453; The Jerusalem, 2 Gall. 349. Supplies furnished in one State to a vessel belonging to another are furnished to a foreign vessel, the States being for this purpose foreign to each other. The Chusan, 2 Story, 455; The Nestor, 1 Sum. 73; The Henrietta, Newb. Adm. 284; The Stephen Allen, 1 Blatchf. & H. 175; Tree v. The Indiana, Crabbe, 479; The Superior, Newb. Adm. 176; The Charles Mears, Newb. Adm. 197. Where a lien exists by the foreign maritime law, our courts have power to enforce it, though all the parties are foreigners (The Maggie Hammond, 9 Wall. 435); but the questions arising thereon are governed by the general maritime law. The Chusan, 2 Story, 455. Necessaries in the port of a State to which the ship belongs are governed by the local law, and no lien is implied; but if the local law gives a lien, it may be enforced in admiralty by a proceeding *in rem*. The Lottawana, 21 Wall. 558; The Gen. Smith, 4 Wheat. 438; New Jersey etc. Co. v. Merchants' Bank, 6 How. 390; Peyroux v. Howard, 7 Peters, 324; Davis v. The Brig, Gilp. 473; The Marion, 1 Story, 68; Ship Robert Fulton, 1 Paine, 620; The Island City, 1 Low. 375; The S. M. Whipple, 7 Sawy. 69; The Canada, 7 Sawy. 173;

The City of Salem, 7 Sawy. 477; Gardner v. New Jersey, 1 Pet. Adm. 227, 233, note; The Celestine, 1 Biss. 1; Remnants, Olcott, 382; The Calisto, 2 Ware, 30; The Dismet, 10 Fed. Rep. 483; *contra*, The Selt, 3 Biss. 344; The Circassian, 11 Blatchf. 473; Taylor v. The Commonwealth, 6 Chic. L. N. 334; Whittaker v. The Travis, 7 Chic. L. N. 277; The Harrison, 1 Sawy. 353; The Augusta, 5 Amer. L. T. 482. It is no consequence how the lien arises, whether by statute, municipal, or common law. The Marion, 1 Story, 68. If a person furnishing a foreign ship gives an exclusive credit, there is no lien. Zane v. Brig President, 4 Wash. C. C. 453; The Patapsco, 13 Wall. 329. Simply giving credit for a certain time does not extinguish the lien therefor. Brig Nestor, 1 Sum. 73. The party seeking to enforce a lien is bound to establish its existence. Gen. Smith, 4 Wheat. 438. Where the lien once attaches, it is only removed by an act which actually displaces it. The Patapsco, 13 Wall. 329. The remedy of the material man is always threefold; against the vessel and freight *in rem*, the master *in personam*, or the owner *in personam*. North v. Brig Eagle, Bee, 78; The Chusan, 2 Story, 455; The Gen. Smith, 4 Wheat. 438; The Marion, 1 Story, 68; Endner v. Greco, 3 Fed. Rep. 411; Shrewsbury v. Two Friends, Bee, 433; Phillips v. Thos. Scattergood, Gilp. 1; Schultz v. Bosman, 5 Hughes, 97.

RULE 13.

Suits for mariners' wages.—In all suits for mariners' wages the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or the master alone *in personam*.

Seamen's wages.—Seamen have a triple security for their wages, in the vessel, the owner and the master. Bronde v. Haven, Gilp. 592. The owner is liable personally, though his name is not mentioned in the shipping articles (Bronde v. Haven, Gilp. 592); and even though he let the ship to the master (unless at time seamen ship they so understand). Skolfield v. Potter, Davies, 392. The lien of seamen attaches to the ship and freight, and follows them wherever they may go. Brown v. Lull, 2 Sum. 443. The claims have prior-

ity over all others. *Brown v. Lull*, 2 Sum. 443; *The St. Jago de Cuba*, 9 Wheat. 409. They have precedence even over the claims of material men (*Steamboat America*, 6 Law Rep. N. S. 264); and over bottomry bonds (*Pitman v. Hooper*, 2 Sum. 50); and are not discharged by the sale of the vessel on execution (*Foster v. The Pilot*, Newb. Adm. 215); nor until properly discharged according to law. *The Eastern Star*, 1 Ware, 185. Seamen have a lien on freight money earned by the vessel. *Sailor Prince*, 1 Ben. 234. In case of a wreck where portions are saved seamen have a lien on them for wages (*Brackett v. The Hercules*, Gilp. 184); but if they abandon the wreck they lose their lien against any portion which may be saved. *Lewis v. Elizabeth and Jane*, 1 Ware, 33. Though a seaman who shipped for a voyage render services only in port, he has a lien on vessel for his wages (*Brig Blohm*, 1 Ben. 228), even though the vessel do not make voyage. *The Island City*, 1 Low. 375. Seamen's wages in an illegal voyage cannot be recovered in a court of law. *Brig Langdon Cheves*, 2 Mason, 58. The mariner's lien has no analogy to common-law liens as regards possession of subject of lien. *Ship Mary*, 1 Paine, 180. The master of a vessel has no lien thereon for wages. *Steamboat Orleans*, 11 Peters, 185; *L'Arina v. Brig Exchange*, Bee, 198; *L'Arina v. Manwaring*, Bee, 199; *Logan v. Steamboat Æolian*, 1 Bond, 267. But a master may maintain a suit *in personam* for his wages. *Hammond v. Essex F. J. Co.* 4 Mason, 196.

RULE 14.

Suits for pilotage.—In all suits for pilotage the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone, *in personam*.

Pilotage.—The admiralty has jurisdiction *in rem* as well as *in personam* for money earned in piloting a vessel. *Schooner Anna*, 1 Mason, 507; *Hyer v. Schooner Wave*, 7 N. Y. Leg. Obs. 97; *The William Law*, 14 Fed. Rep. 792. A contract for pilotage duly authorized is a lien on the vessel (*The Anne*, 1 Mason, 507); but wrongdoers or mutineers have no authority to bind a ship for

pilotage. *The Anne*, 1 Mason, 507; *Logan v. Steamboat Æolian*, 1 Bond, 267.

RULE 15.

Suits for damage by collision.—In all suits for damage by collision the libelant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone, *in personam*.

Damage by collision, suit for.—Admiralty courts take jurisdiction of all collisions on the high seas or within the tide waters of United States. *Warring v. Clarke*, 5 How. 441. The owner of the vessel injured by a collision has a lien on the offending vessel of equal rank with those of material men. *Steamboat America*, 6 Law Rep. N. S. 264. The libelant may proceed against the ship and master, ship alone, owner alone, or master alone. *Atlantic & Ogdensburg*, 1 Newb. 139; *Newell v. Norton*, 3 Wall. 257. Joining the ship and owner is prohibited. *Atlantic & Ogdensburg*, 1 Newb. 139; *S. S. Zodiac*, 5 Fed. Rep. 220; *The Clatsop Chief*, 7 Sawy. 274. But the libelant may proceed successively in each way until the demand is satisfied. *Ward v. Ogdensburg*, 5 McLean, 622. Though the collision arise through negligence of master, ship is primarily though not exclusively liable. *Hale v. Wash. Ins. Co.* 2 Story, 176. Collisions occurring in foreign ports are governed by the statutes existing in such port. *Smith v. Condry*, 1 How. 28

RULE 16.

Suits for assault and battery.—In all suits for an assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only.

Assault and battery.—The admiralty has cognizance of all torts committed within the admiralty and maritime jurisdiction of these courts. *Thomas v. Lane*, 2 Sum. 1. An officer of a ship is personally liable for an assault and battery on a seaman (*Forbes v. Parsons*, *Crabbe*, 283; *Roberts v. Dallas*, *Bée*, 239), or on a passenger. *Chamberlain v. Chandler*, 2 Mason, 242. The master

may be held liable for such assault of his officer done under his authority or knowledge. *Hanson v. Fowle*, 1 Sawy. 539. As to what is an assault within the rule, see *The Lord Derby*, 17 Fed. Rep. 265.

RULE 17.

Suits for hypothecation.—In all suits against the ship or freight founded upon a mere maritime hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or repairs, or other necessities for the voyage, without any claim of marine interest, the libellant may proceed either *in rem*, or against the master or the owner alone *in personam*.

Hypothecation of vessel.—Hypothecation is void unless made in a foreign port; but in United States all ports but the home port are foreign to the vessel. *Burk v. Brig M. P. Rich*, 1 Cliff. 308. Hypothecation is void unless advances were exigently necessary to effectuate the object of the voyage or safety of the ship (*The Grapeshot*, 9 Wall. 129; *Selden v. Hendricksen*, 1 Brock. 396; *Crawford v. The Wm. Penn*, 3 Wash. C. C. 484), or were believed to be necessary after due inquiry (*The Lulu*, 10 Wall. 192; *The Neversink*, 5 Blatchf. 539), or that they could not be procured on owner's credit (*The Aurora*, 1 Wheat. 96; *The Kalorama*, 10 Wall. 208; *The Patapsco*, 13 Wall. 329; *O'Hara v. Ship Mary, Bee*, 100); for it is not a contract of hypothecation if there were funds for such advances in consignee's hand. *Henry v. Ship John and Alice*, 1 Wash. 293.

RULE 18.

Suits on bottomry bonds, when in rem and when in personam.—In all suits on bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the property, in whosoever hands the same may be found, unless the master has, without authority, given the bottomry bond, or by his fraud or misconduct has avoided the same, or

has subtracted the property, or unless the owner has, by his own misconduct or wrong, lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrong-doer.

Bottomry bonds.—A bottomry bond may be made either in a foreign or a home port. *The Drace*, 1 Sum. 157. Such a bond made in a foreign port between foreigners will be enforced here, if the ship is in the maritime jurisdiction of United States courts. *The Jerusalem*, 2 Gall. 190; *The Packet*, 3 Mason, 255. Necessity only can authorize a master to pledge the vessel for repairs by giving a bottomry bond (*Patton v. Randolph*, Gilp. 457); where the owner is present, or he has funds, he cannot do so. *Patton v. Randolph*, Gilp. 457.

RULE 19.

Suits for salvage.—In all suits for salvage the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed.

Suits for salvage.—Salvors cannot in the same libel proceed *in rem* against the vessel and *in personam* against the consignors (*The Sabine*, 11 Otto, 384); but this does not exclude the right to pursue these remedies severally. *Brevoort v. Ship Fair American*, 1 Pet. Adm. 87. A lien for salvage services exists on the property saved (*Eads v. Steamboat Bacon*, 1 Newb. Adm. 274; *The Camanche*, 8 Wall. 448), and accompanies the property and will follow it in hands of a bailee (*Gates v. Johnson*, 11 Law Rep. N. S. 277), but a lien for salvage cannot be enforced against United States personal property by proceeding *in rem*. *The Davis*, 10 Wall. 15. Where some of the salvors do not prosecute their claim, this enures to the benefit of the owners of vessel, and not to the other salvors. *The Blackwall*, 10 Wall. 1.

RULE 20.

In petitory and possessory suits.—In all petitory and possessory suits between part owners or adverse pro-

prietors, or by the owners of a ship, or the majority thereof, against the master of a ship for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part owners against the others to obtain possession of the ship for any voyage, upon giving security for the safe return thereof, the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit.

Rights of part owners.—A part owner may ask the court for security for safety of the vessel on a voyage not approved by him. *Fox v. Lodemia*, Crabbé, 271; *The Marengo*, 1 Sprague, 506. The court will not interfere with one-half owner's possession when the other, who had charge of the vessel, left it in an unsafe condition. *The Ocean*, 1 Sprague, 535. This rule requires a proceeding *in rem* and *in personam* (*Propellor v. Ives*, 1 Newb. Adm. 215) jointly and in one action. Abb. Adm. 48.

RULE 21.

Decrees, enforcement of.—In all cases of a final decree for the payment of money the libellant shall have a writ of execution, in the nature of a *feri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulators.

Amended December Term, 1861, 1 Black, vi.

Execution.—A stipulation given for release of a vessel takes the place of a vessel (*The Fidelity*, 16 Blatchf. 569), and execution will issue summarily against the stipulators. *Gaines v. Travis*, Abb. Adm. 422. The decree for the payment of money must be enforced by execution, and not by sequestration. *The Blanch Page*, 16 Blatchf. 1.

RULE 22.

Informations and libels on seizures.—All informations and libels of information upon seizures for any breach of the revenue, or navigation, or other laws of the United States, shall state the place of seizure, whether it be on land or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and the district within which the property is brought, and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture, and to give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed.

Forfeitures, informations for.—To give jurisdiction the libel must show that there has been and is still subsisting a seizure of the vessel for an offense. The *Washington*, 4 Blatchf. 101; *U. S. v. Ninety-two Barrels Spirits*, 8 Blatchf. 480. The libel should state distinctly the matters relied on as grounds or causes of forfeiture. *Eighteen Thousand Galls. Dis. Spirits*, 5 Ben. 4. But it is no bar that the grounds of forfeiture are not the same as those on which the seizure was made. *Wood v. U. S.* 16 Peters, 342. The libel should aver specially all material facts constituting the offense charged. *Brig Caroline v. U. S.* 7 Cranch, 496; *Brig Caroline*, 1 Brock. 384; *U. S. v. Twenty-five Barrels Alcohol*, 10 Int. Rev. Rec. 17. Time and place of seizure must be specially averred. *U. S. v. Timber*, 13 Fed. Rep. 769. A general reference to the provisions of the statute is not sufficient. *Schooner Hapet v. U. S.* 7 Cranch, 389.

RULE 23.

Libels in instance causes.—All libels in instance causes,
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civil or maritime, shall state the nature of the cause; as, for example, that it is a cause, civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be; and if the libel be *in rem*, that the property is within the district; and if *in personam*, the names and occupations and of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegations of fact upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of due process to enforce his rights *in rem* or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

What to be stated.—The libel should always show the jurisdiction of the court. *Boon v. The Hornet*, Crabbe, 426; *Thomas v. Lane*, 2 Sum. 1. The subject-matter of the libel should be stated with certainty and precision, and with averments admitting of distinct answers (*Schooner Boston*, 1 Sum. 328; *The Bark Havre*, 1 Ben. 295; *Pettingill v. Dinsmore*, Davies, 209); as movements and course of vessels in case of collision (*McWilliams v. Steam Tug Vim*, 2 Fed. Rep. 875); and time and place. *Treadwell v. Joseph*, 1 Sum. 390; *Thomas v. Lane*, 2 Fed. Rep. 1. Pleas and exceptions should set forth the matter in dispute in definite terms, but not with formality of common-law pleading. *Schooner v. Novarra*, Olcott, 127. Inserting of a party having no interest may be disregarded. *Talbot v. Wakeman*, 19 How. Pr. 26. It is not necessary in a libel to state any fact which constitutes a matter of defense. *Aurora v. U. S.* 7 Cranch, 382. Under this rule interrogatories annexed to the libel are confined to issuable matter, and only the defendant's oath is required in response thereto.

Havermeyer & Elder Sugar Ref. Co. v. Compania Transatlantica Espanola, 43 Fed. Rep. 90.

RULE 24.

Amendments to libels, etc., of course.—In all informations and libels, in causes of admiralty and maritime jurisdiction, amendments, in matters of form, may be made at any time, on motion, to the court as of course. And new counts may be filed, and amendments, in matters of substance may be made upon motion at any time before the final decree, upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

Amendments to libels.—A libel may be amended on motion, as of course, after exception without submitting to the exception. *Town v. St. Western Metropolis*, 28 How. Pr. 283; *Newell v. Norton*, 3 Wall. 257. A libel or information *in rem* may be amended (*Brig Caroline v. U. S.* 7 Cranch, 496), even after reversal for want of substantial averments. *Schooner Anne*, 7 Cranch, 570.

RULE 25.

Security for costs, when.—In all cases of libels *in personam* the court may, in its discretion, upon the appearance of the defendant, where no bail has been taken, and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation, with sureties in such sum as the court shall direct, to pay all costs and expenses which shall be awarded against him in the suit, upon the final adjudication thereof, or by any interlocutory order in the progress of the suit.

Security for costs.—There should usually under this rule be a security for costs (*Rawson v. Lyon*, 15 Fed. Rep. 831); but if defendants appear without it, and no

exception is taken, security is thereby waived. *Pharo v. Smith*, 18 How. Pr. 47.

RULE 26.

Claim, when to be verified.—In suits *in rem* the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant by whom or on whose behalf the claim is made is the true and *bona fide* owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath that he is duly authorized thereto by the owner; or if the property be at the time of the arrest in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And upon putting in such claim the claimant shall file a stipulation, with sureties in such sum as the court shall direct for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or upon an appeal by the appellate court.

Verification by agent.—An agent verifying a claim must also make oath that he is duly authorized to do so. *The R. W. Skillinger*, 1 Flipp. 437; *U. S. v. Twenty-five Barrels Alcohol*, 10 Int. Rev. Rec. 17. See *The Two Marys*, 12 Fed. Rep. 152.

Costs.—Where an owner gives a stipulation for costs, he is liable only for costs properly incident to the contest. *The Vernon*, 36 Fed. Rep. 113.

RULE 27.

Answer to be verified.—In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation; and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel, and shall

also answer in like manner each interrogatory propounded at the close of the libel.

Qualified by Rule 48; *vide, post*.

Verification of answer.—The answer must be on oath (Samuel *v.* Skinner, 2 Gall. 45), and of the defendant himself and not another for him. Teasdale *v.* The Rambler, Bee's Adm. 9.

RULE 28.

Exception to answer.—The libellant may except to the sufficiency, or fulness, or distinctness, or relevancy of the answer to the articles and interrogatories in the libel; and if the court shall adjudge the same exceptions, or any of them, to be good and valid, the court shall order the defendant forthwith, within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

Exception to answer.—An exception to an allegation that it serves no legal purpose is properly excepted to for impertinence. The Pioneer, Deady, 58.

RULE 29.

Default, effect of.—If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte* and adjudge therein as to law and justice shall appertain. But the court may, in its discretion, set aside the default, and, upon the application of the defendant, admit him to make answer to the libel at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

Default, effect of.—A default here has the effect of a default at the common law; it establishes the fact pleaded and justifies a decree. *Miller v. U. S.* 11 Wall. 268.

RULE 30.

Further answer, when required.—In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant to the full purport and effect of the article to which it purports to answer, and if no answer had been put in thereto.

RULE 31.

What allegation need not be answered.—The defendant may object, by his answer, to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penal offense.

Criminating evidence need not be produced.—A party is not bound to produce any evidence which would subject him to a forfeiture for a penal offense. *U. S. v. Twenty-eight Packages*, Gilp. 306; *Pollock v. The Laura*, 5 Fed. Rep. 133.

RULE 32.

Interrogatories propounded in answer.—The defendant shall have a right to require the personal answer of the libellant, upon oath or solemn affirmation, to any interrogatories which he may, at the close of his answer, propound to the libellant touching any matters charged in the libel, or touching any matter of defense set up in

the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution, or punishment, or forfeiture, as is provided in the thirty-first rule. In default of due answer by the libellant to such interrogatories, the court may adjudge the libellant to be in default and dismiss the libel, or may compel his answer in the premises by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as the court, in its discretion, shall deem most fit to promote public justice.

Refusal to answer interrogatories.—Where an answer to an interrogatory is refused, the charge to which the interrogatory relates may be taken *pro confesso* (The David Pratt, 1 Ware, 509), or the defendant may be compelled to answer the interrogatories. *Gamme v. Skinner*, 2 Gall. 45.

RULE 33.

Verification of answer to interrogatory, when dispensed with.—Where either the libellant or the defendant is out of the country, or unable, from sickness or other casualty, to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may, in its discretion, in the furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

RULE 34.

Intervention, how.—If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem* for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard for his own interests therein, he shall propound the matter in suitable allegations, to which, if admitted by the court, the other party or parties in the

suit may be required, by order of the court, to make due answer; and such further proceedings shall be had and decreed rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation, with sureties, to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

Intervenor, rights of.—A person claiming an interest may intervene and contest forfeiture so far as decree would be conclusive of his rights (*The Mary Anne*, 1 Ware, 99), even though his original demand could not have been proceeded for in admiralty. *Harper v. New Brig*, Gilp. 536. He merely seeks protection of his interest or payment of his claim, and not possession of the vessel. *The Two Marys*, 12 Fed. Rep. 152.

RULE 35.

Stipulations, how given and taken.—The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or other maritime proceeding, shall be given and taken in the manner prescribed by rule fifth as amended.

See notes to Rule 5.

RULE 36.

Exceptions, effect of allowance.—Exceptions may be taken to any libel, allegation, or answer, for surplusage, irrelevancy, impertinence, or scandal; and if, upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged, at the cost and expense of the party in whose libel or answer the same is found.

Amended May 6, 1872, 14 Wall. 21.

RULE 37.

Attachment, proceedings against garnishee.—In cases of foreign attachment the garnishee shall be required to answer on oath or solemn affirmation as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admits any debts, credits, or effects, the same shall be held in his hands, liable to answer the exigency of the suit.

Proceedings against garnishee.—Where defendant has absconded or concealed himself, process may issue against his credits and effects in the hands of a third party. *Manro v. Almeida*, 10 Wheat. 473. It is the right and duty of the garnishee to put in an answer, and libellant has not the right to contest said answer. *Story v. Rennell*, 1 Sprague, 418. On default of garnishee, libellant may have process to compel him to answer (*McDonald v. Rennell*, 11 Law Rep. N. S. 157), by execution, first against the effects of the principal in his hands, and then on his own property. *Story v. Rennell*, 1 Sprague, 418.

RULE 38.

Property, how brought into court.—In cases of mariners' wages or bottomry, or salvage, or other proceedings *in rem*, where freight or other proceeds of property are attached to or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application, by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit; and upon failure of the party to com-

ply with the order may award an attachment, or other compulsory process, to compel obedience thereto.

Process to bring property into court.—The proper process to bring property into court is by monition, and not by execution against the party having the possession thereof. *The Gran Para*, 10 Wheat. 497; *Sheppard v. Taylor*, 5 Peters, 675.

RULE 39.

Non-appearance of libellant — Dismissal.—If, in any admiralty suit, the libellant shall not appear and prosecute his suit, according to the course and orders of the court, he shall be deemed in default and contumacy, and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

RULE 40.

Decree, when may be rescinded.—The court may in its discretion, upon the motion of the defendant and on payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grants a rehearing thereof at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

Rehearing.—A rehearing cannot be had after the term at which decree was rendered has passed. *Steamboat New England*, 3 Sum. 495.

RULE 41.

Sales of property and proceeds.—All sales of property under any decree of admiralty shall be made by the marshal or his deputy, or other proper officer assigned by the court, where the marshal is a party in interest,

in pursuance of the order of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

Duty of marshal.—Upon interlocutory sales, it is the duty of the marshal to bring the proceeds into court, with an account of sales. *The Avery and Cargo*, 2 Gall. 308. If the sale is on credit, the immediate proceeds should be brought into court. *Walls v. Thornton*, 2 Brock. 422.

RULE 42.

Moneys, deposit of.—All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out except by check or checks signed by a judge of the court, and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book containing a memorandum and copy of all the checks so drawn and the date thereof.

RULE 43.

Intervenor for proceeds, how to come in.—Any person having an interest in any proceeds in the registry of the court shall have a right, by petition and summary proceedings, to intervene *pro interesse suo* for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice. And if such petition or claim shall be deserted, or, upon a hearing, be dismissed, the court may in its discretion award costs against the petitioner in favor of the adverse party.

Intervention for proceeds.—A party having a vested right in funds in hands of the court may claim a dis-

tribution to him (*Harper v. A New Brig, Gilp*, 536; *The Lottawana*, 21 Wall. 558; *The Goldsmith*, 1 Newb. Adm. 123); as in case of a mortgage on part of the vessel (*Schuchart v. Ship Angelique*, 19 How. 239; *Ship Panama*, Olcott, 55; *The Alice Getty*, 2 Flipp. 20), whether he could or could not enforce his original claim in admiralty. *Leland v. Medora*, 2 Wood. & M. 92. But such funds cannot be applied to a contract merely personal, as a debt of the owner. *Brackett v. Hercules*, Gilp. 184.

RULE 44.

Reference to commissioners, when. — In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in reference to them, including the power to administer oaths to and to examine the parties and witnesses touching the premises.

Reference to commissioners. — When there is a dispute as to accounts, priority of liens and like matters, reference to a commissioner is proper. *Shaw v. Collier*, 28 How. Pr. 238; *Furniss v. Brig Magoun*, Olcott, 55.

RULE 45.

Appeals, when made. — All appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules, or by an order specially made in the particular suit, or in case no such rule or order be made, then within thirty days from the rendering of the decree.

Amended May 6, 1872, 13 Wall. xiv.

Appeals, when taken. — An appeal must be taken in open court before the adjournment of the term, *sine*

die. Norton v. Rich, 3 Mason, 443. But if notice of appeal is filed within thirty days after decree, the appeal will be allowed whenever justice requires it. Nuestra Senora, 17 Wall. 29.

RULE 46.

Practice, courts to regulate.—In all cases not provided for by the foregoing rules, the district and circuit courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

RULE 47.

Arrest, bail when taken.—In all suits *in personam* where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State where an arrest is made upon similar or analogous process issuing from the State courts.

Imprisonment for debt, where abolished.—And imprisonment for debt, on process issuing out of the admiralty court, is abolished in all cases where, by the laws of the State in which the court is held, imprisonment for debt has been or shall be hereafter abolished, upon similar or analogous process issuing from a State court.

Promulgated December Term, 1850, 10 How. v. See *Bremena v. Card*, 38 Fed. Rep. 144. See Rule 23.

Arrest and bail.—These rules being authorized by statute, an arrest under them has the effect of an arrest under and by virtue of a statute. *Gaines v. Travis*, Abb. Adm. 422; *Marshall v. Bazin*, 7 N. Y. Leg. Obs. 342. Where bail is allowed by the State law, a party may have it here as a matter of right. *Beers v. Haughton*, 9 Peters, 329.

RULE 48.

Answer, sufficiency of.—The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars, exclusive of costs, unless

the district court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice in the case before the court. All rules and parts of rules heretofore adopted inconsistent with this order are hereby repealed and annulled.

Promulgated December Term, 1850, 10 How. vi.

RULE 49.

Appeal, further proof, how taken.—Further proof taken in a circuit court upon an admiralty appeal shall be by deposition, taken before some commissioner appointed by a circuit court, pursuant to the acts of Congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the act of Congress of the 24th of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such depositions upon written interrogatories and cross-interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party to be present at the taking of the same, and to put interrogatories, if he think fit, shall be served on the adverse party, or his attorney, allowing time for their attendance after being notified not less than twenty-four hours, and in addition thereto one day, Sundays exclusive, for every twenty miles' travel; *provided*, that the court in which such appeal may be pending, or either of the judges thereof may, upon motion, increase or diminish the length of notice above required.

Promulgated December Term, 1851, 13 How. vii. See Revised Statutes, § 865.

Further proof on appeal.—Where the evidence is so

contradictory or ambiguous as to render the decision difficult, the court will order further proof. *The Samuel*, 1 Wheat. 9. If no order therefor appear on the record, and no objection taken thereto, it is presumed that there was an order or mutual consent. *The Georgia*, 7 Wall. 33.

RULE 50.

Oral evidence when admissible on appeal.—When oral evidence shall be taken down by the clerk of the district court pursuant to the above-mentioned section of the act of Congress, and shall be transmitted to the circuit court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them if he should so elect.

Promulgated December Term, 1851, 13 How. vi.

RULE 51.

New facts in answers, how met.—When the defendant, in his answer, alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be allowed. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his libel so as to confess and avoid, or explain, or add to the new matters set forth in the answer; and within such time as may be fixed, in like manner, the defendant shall answer such amendments.

Promulgated December Term, 1854, 17 How. vi.

RULE 52.

1. Records on appeal, how made up.—The clerks of the district courts shall make up the records to be transmitted to the circuit courts on appeals, so that the same shall contain the following:—

1. The style of the court.

2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

3. If bail was taken, or property was attached or arrested, the process of the arrest or attachment and the service thereof all bail and stipulations, and, if any sale has been made, the orders, warrants, and reports relating thereto.

4. The libel, with exhibits annexed thereto.

5. The pleadings of the defendant, with the exhibits annexed thereto.

6. The testimony on the part of the libellant, and any exhibits not annexed to the libel.

7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

8. Any order of the court to which exception was made.

9. Any report of an assessor or assessors, if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made, and so much of the report as shows what results were arrived at by the assessor, are to be stated.

10. The final decree.

11. The prayer for an appeal, and the action of the district court thereon; and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted:—

1. The continuances.

2. All motions, rules, and orders not excepted to, which are merely preparatory for trial.

3. The commissions to take depositions, notice therefor, their captions, and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these; in

which case so much of either of them as may be involved in the exception shall be set out. In all other cases it shall be sufficient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where and the date when the deposition was sworn to; and in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

Note.—Where the causes assigned were good but the transcript was defective, but not attributable solely to appellant, a motion to dismiss was denied, and appellant was directed to file a proper transcript by the first day of the next term. *The Ethel*, 31 Fed. Rep. 576. Omissions in the record may be brought before the court by *certiorari* by appellees. *Hoskin v. Fisher*, 125 U. S. 217.

2. Certificate of clerk.—The clerk of the district court shall page the copy of the record thus made up, and shall make an index thereto, and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the district court in the cause named at the beginning of the copy made up pursuant to this rule; and no other certificate of the record shall be needful or inserted.

3. What may be omitted on stipulation.—Hereafter, in making up the record to be transmitted to the circuit court, on appeal, the clerk of the district court shall omit therefrom any of the pleading, testimony, or exhibits which the parties, by their proctors shall, by written stipulation, agree may be omitted, and such stipulation shall be certified up with the record.

Promulgated December Term, 1854, 17 How. vi. Amended by adding clause 3, May 2, 1881, 13 Otto, xiii.

Record on appeal.—Where exceptions taken in the lower court do not appear on the record they are deemed to have been waived. *The Vaughn*, 14 Wall.

258. The record should show the amount in controversy, but if not shown, further time therefor may be allowed. *The Grace Girdler*, 6 Wall. 441.

RULE 53.

Cross-libel, security for costs by respondent.—Whenever a cross-libel is filed upon any counter-claim arising out of the same cause of action for which the original libel was filed, the respondents in the cross-libel shall give security, in the usual amount and form, to respond in damages as claimed in said cross-libel, unless the court, on cause shown, shall otherwise direct; and all proceedings upon the original libel shall be stayed until such security shall be given.

Promulgated December Term, 1868, 7 Wall. v.

Cross-libel security for costs.—The claim on which the cross-libel is founded must arise out of the same cause of action as the libel itself (*Crowell v. Schooner Theresa Wolf*, 5 Fed. Rep. 152), but not necessarily, the same legal demand. *Vianello v. Credit Lyonnais*, 15 Fed. Rep. 637. The object of the rule is to compel respondent to cross-bill to give security (*Steamer Bristol*, 4 Ben. 55), and until given proceedings will, on motion, be stayed. *The Geo. Parker*, 1 Flipp. 606; *The Ping On*, 7 Sawy. 483. None other than parties in the original libel can be joined as parties in the cross-bill. *Ping On v. Blethen*, 11 Fed. Rep. 607. An affidavit that the respondent in a cross-libel cannot give security to the amount of the damages demanded, "without serious embarrassment to his business and great expense and sacrifice," does not show cause for taking less security on a motion under this rule to fix the amount. *Compagnie Universelle du Canal Interocéanique v. Belloni*, 45 Fed. Rep. 587.

RULE 54.

Suits for embezzlement of master, etc.—When any ship or vessel shall be libeled, or the owner or owners thereof shall be sued, for any embezzlement, loss or destruction by the master, officers, mariners, passengers or any

other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred, without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the act of March 3, 1851, entitled "An act to limit the liability of ship owners and for other purposes," now embodied in sections 4283 to 4285 of the Revised Statutes, the said owner or owners shall and may file a libel or petition in the proper district court of the United States, as herein-after specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisalment to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation, with sureties, for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisalment, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and, upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public

notice of such monition shall be given as in other cases, and such further notice re-served through the post-office, or otherwise, as the court, in its discretion, may direct; and the said court shall also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

It is further ordered that the present heading to this rule be erased.

Original order promulgated May 6, 1872, 13 Wall. xii. Amendment promulgated January 26, 1891, 137 U. S. 711.

RULE 55.

Proof of claims, before whom made.—Proof of all claims which shall be presented in pursuance of said motion shall be made before a commissioner to be designated by the court, subject to the right of any person interested to question or controvert the same; and, upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expenses) shall be divided *pro rata* amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

Promulgated May 6, 1872, 13 Wall. xiii.

RULE 56.

Who may defend.—In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his

or their liability, or the liability of said ship or vessel, for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act); *provided*, that in his or their libel or petition he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both.

Promulgated May 6, 1872, 13 Wall. xiii.

RULE 57.

Jurisdiction, where it attaches.—The said libel or petition shall be filed, and the said proceedings had in any district court of the United States in which said ship or vessel may be libeled to answer for any such embezzlement, loss, destruction, damage, or injury; or if the said ship or vessel be not libeled, then in the district court for any district in which the said owner or owners may be sued in that behalf.

When the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the district court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship have already been libeled and sold, the proceeds shall represent the same for the purposes of these rules.

Original order promulgated May 6, 1872, 13 Wall. xiii. Amendment promulgated April 22, 1889, 130 U. S. .

Application of rule. — See The Alpena, 8 Fed. Rep. 279.

RULE 58.

Preceding rules apply on appeal. — All the preceding rules and regulations for proceeding in causes where the owner or owners of a ship or vessel shall desire to claim the benefit of limitation of liability provided for in the act of Congress in that behalf shall apply to the circuit courts of the United States where such cases are or shall be pending in said courts on appeal from the district courts.

Promulgated March 30, 1881, 13 Otto, xiii. See Re Petition of Lord, 31 Fed. Rep. 416.

RULE 59.

Suit for damages. — In a suit for damages by collision, if the claimant of any vessel proceeded against, or any respondent proceeded against *in personam*, shall by petition, on oath, presented before or at the time of answering the libel, or within such further time as the court may allow, and containing suitable allegations showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damages, pray that process be issued against such vessel or party to that end, such process may be issued, and, if duly served, such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall, upon filing his petition, give a stipulation, with suf-

ficient sureties, to pay to the libellant and to any claimant or new party brought in by virtue of such process, all such costs, damages and expenses as shall be awarded against the petitioner by the court upon the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in like cases from parties brought in under process issued on the prayer of a libellant.

Promulgated March 26, 1883, 112 U. S. 743.

Rule of division of damages.—The admiralty rule of division of damages where both vessels are in fault applies to all cases of negligence. *The Alert*, 44 Fed. Rep. 685; *Steamer Max Morris v. Curry*, 137 U. S. 1. Applied in case of an injury to one employed to load coal, by falling from a steamer's bridge. *Steamer Max Morris v. Curry*, 137 U. S. 1. The rule of division of damages has been applied in the following cases: *The Virginia Ehrman*, 97 U. S. 309; *City of Hartford*, 97 U. S. 323; *The Civiltà*, 103 U. S. 699; *The Connecticut*, 103 U. S. 710; *The North Star*, 106 U. S. 17; *The Sterling*, 106 U. S. 647; *The Manitoba*, 122 U. S. 97; and the earlier cases of *Rogers v. Steamer St. Charles*, 60 U. S. 108; *Chamberlain v. Ward*, 62 U. S. 548; *The Washington*, 76 U. S. 513; *The Sapphire*, 78 U. S. 164; *The Ariadne*, 80 U. S. 475; *The Continental*, 81 U. S. 345; *Atlee v. Northwestern U. Packet Co.* 88 U. S. 389; *The Teutonia*, 90 U. S. 77; *The Sunnyside*, 91 U. S. 208; *The America*, 92 U. S. 432; *The Alabama*, 92 U. S. 695; *The Atlas*, 93 U. S. 302; *The Juniata*, 93 U. S. 337; *The Stephen Morgan*, 94 U. S. 599. See *The New York*, 34 Fed. Rep. 757. The claimant or respondent in a suit for damages by collision may compel libellant to bring in another vessel or party alleged to have been in fault. *Steamer Max Morris v. Curry*, 137 U. S. 1.

RULES

OF THE

COURT OF PRIVATE LAND CLAIMS.

RULE 1.

Duties of the clerk.—The clerk shall be the custodian of the records of the court. He shall keep the following records at each place at which the regular terms of the court are held, viz., a journal in which he shall record all orders, decrees, and judgments entered by the court, an appearance docket in which he shall enter the title of all claims or causes filed or brought in the court at that place, and in which he shall note the filing of the petition and all pleadings filed subsequent thereto, and a reference showing the journal page of all orders and entries made in the progress of the cause.

He shall also keep a book for the use of the court at each term, in which he shall enter each cause then pending at that place and undisposed of, by its title, leaving sufficient blank space opposite each case for the entry by the court of the memoranda of orders and judgments.

And the clerk shall keep an office at each place, at which the regular terms of court are held. Every
FED. PROC.—104.

cause brought by a claimant of land under the provisions of the sixth and eighth sections of the Act approved March 3, 1891, establishing the court, shall be entitled in the name of such claimant or claimants as plaintiff, against the United States and such other person or persons as may be designated as holding or claiming adversely to the plaintiff as defendant, and such title shall be preserved in the pleadings, and all other papers filed in the cause, and in all journal entries made during its progress, and all writs, citations, and processes issued therein, and all causes brought by instruction of the department of justice as provided by the eighth section of said act, and in all journal entries, writs, citations, and processes therein, the United States shall be designated as plaintiff and the adverse party or parties as the defendant.

The clerk shall keep a roll of attorneys. Any attorney who is a member of the Supreme Court of the United States, or of any Circuit Court of the United States, or of the highest court of the State or Territory in which he resides, shall upon exhibiting his certificate of admission to the clerk, be entitled to have his name entered upon the roll of attorneys, and to appear in any cause pending before the court.

Actions relating to lands in Wyoming, Nevada, Arizona, or Utah, may, at the election of plaintiff, be brought and presented at either of the places where the regular terms are held.

RULE 2.

As to the filing of petitions, etc.—Every person filing a petition in this court for the confirmation of any claim to land under any grant, shall at the time of filing such petition, deliver to the clerk of the court, or the deputy clerk, the original documents constituting or creating

such grant, also the original documents of all intermediate assignments or conveyances of any right or interest in such grant evidencing the right so claimed by the petitioner.

If, however, any such original document cannot, for any reason, be delivered as herein required, the reason thereof shall be stated, and if such document be in existence but not under the control of petitioner, the name and place of the holder shall be stated, and if it be claimed that any such document be lost or destroyed, the facts and circumstances of such loss or destruction shall be stated. The clerk or deputy so receiving such documents, shall receipt for same, and such document shall not be removed from the custody of this court until the final determination of the confirmation or rejection of such claim. Whenever any original document in any other than the English language shall be delivered to the custody of the court, as herein required, it shall be the duty of the official interpreter to at once translate the same into English in duplicate, one of which shall be filed with the clerk and the other delivered to the United States attorney for this court. Whenever any petitioner shall claim any rights by reason of an inheritance by descent, or by testamentary disposition, he shall set forth in his petition the names and citizenship of all deceased persons through whom it is claimed such right is derived, and the names of the heirs of such deceased persons, and shall set forth the law of the place affecting such right of inheritance. And in case any such right depends upon the last will of any deceased person, the petitioner shall, at the time of filing his petition, deliver to the clerk or deputy a copy of such will, together with a copy of the records of the probate thereof, if any such have been had. Upon filing any petition, the petitioner shall, at the

time of filing the same, deliver to the clerk or deputy a true copy thereof for each person to be served with such petition.

RULE 3.

Rules as to pleadings.— Until the further order of this court, the time for pleadings in all cases shall be extended to the third day of the term at which the cause is returnable.

RULE 4.

Witnesses and their testimony.— In all cases witnesses for either party shall be examined in open court upon the trial of the cause, unless they are sick, infirm, or otherwise unable to attend, and in that event either party desiring the testimony of such witness or witnesses shall make application to the court, or any judge thereof, to take the deposition of such witness or witnesses, and if it appears to the satisfaction of the court or judge that such witness or witnesses ought not to be compelled to appear in court and testify, the court or judge shall make an order allowing the deposition of said witness or witnesses to be taken. Either party applying for an order to take the deposition as herein provided, shall give notice to the adverse attorney of record of the time and place of making such application, at least five days before the day upon which the same is to be made, and shall state the name and residence of each witness whose deposition is desired. The application shall state the name and residence of each witness whose deposition is desired, and what is expected to be proven by each, together with the reasons why such witness should not be required to attend and testify, and the same shall be verified by the oath of some party in interest, or an attorney of record in the cause, and in all cases where an order is made by the court or judge

to take the deposition of any witness or witnesses, the time and place of taking such depositions shall be stated in said order.

RULE 5.

Commission, and to whom directed.—The commission to take depositions of any witness or witnesses may be directed to a commissioner of any Circuit Court of the United States, or to any person qualified to take testimony by the laws of the State or Territory in which the same is to be executed. The person to whom the same shall be directed shall be named therein, and the place of his residence shall be given in a manner that he may be easily found. When the commission shall be directed to an officer of the State or Territory in which it may be executed, a certificate of the official character and authority of such officer from some court or other proper source, shall be returned with it. The manner of certifying and returning depositions shall be as provided in the laws of the State or Territory where taken.

RULE 6.

Depositions, how opened and filed.—Either party may give five days' notice to the opposite party of his intention to apply to the clerk to open and file depositions which have been returned in the court, and if no objections shall be made in writing within the time specified, such depositions may be published as of course. Objections which may be made as aforesaid shall be set down for hearing before a judge of the court on like notice.

RULE 7.

Attorney for the United States.—The attorney for the United States for this court shall not be required to verify by oath any application or motion made to the court or any judge thereof.

RULE 8.

Rule as to costs.—At the time of filing a petition, all parties other than the United States are required to make a deposit with the clerk, of such sum as he may determine to be necessary to pay the fees of the marshal for serving a copy of the petition and citations.

[SEAL.] JAMES H. REEDER, *Clerk*.

By THOMAS B. BALDWIN, *Deputy*.

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